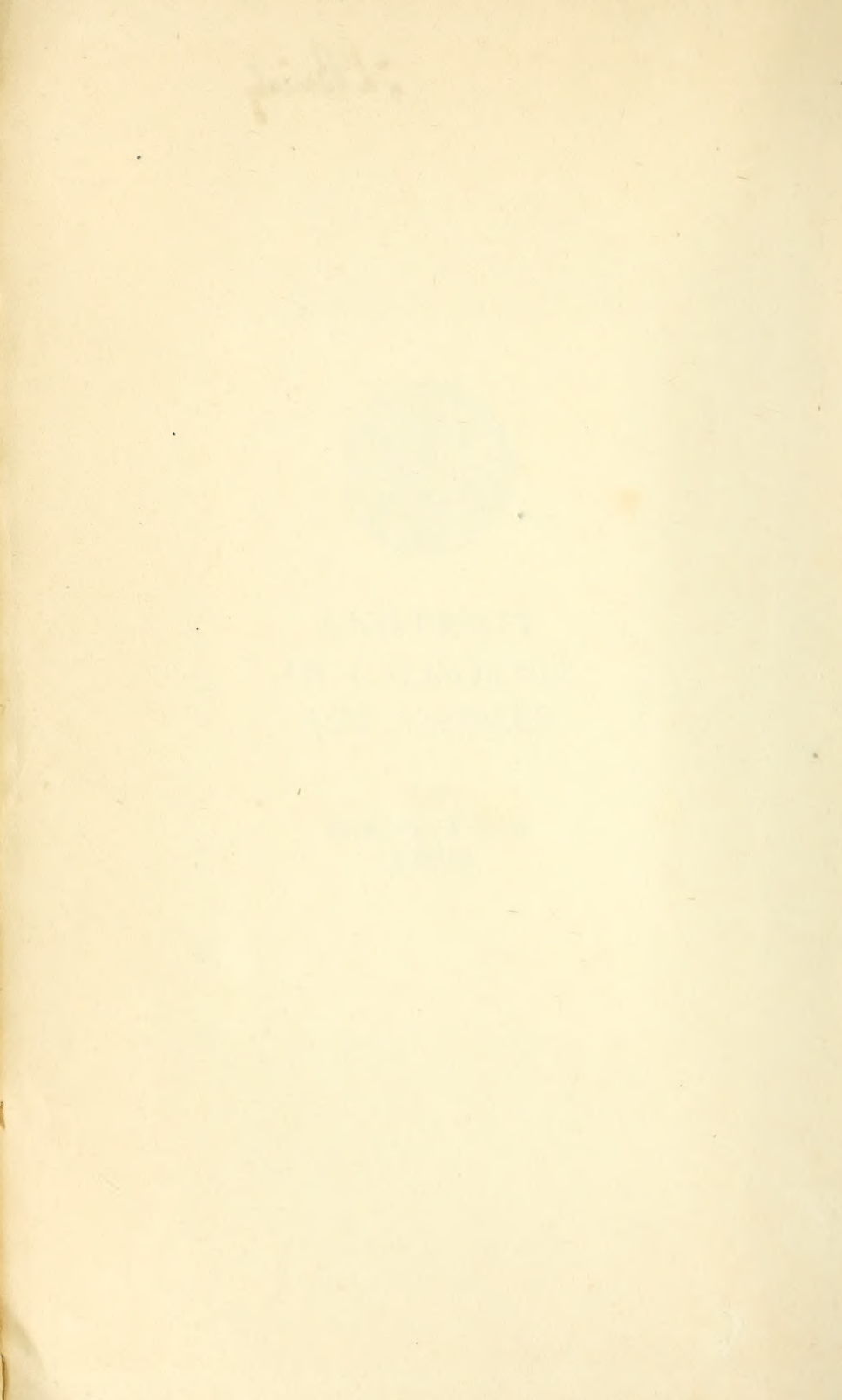




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BY

J. M. SPAIGHT, LL.D.,

and double Senior Moderator, Dublin University (Trinity).

WITH A PREFACE BY

FRANCIS D. ACLAND

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TO MY WIFE

PRETORIA,
May, 1910.

PREFACE

MR. SPAIGHT, with whom I have had the pleasure of working in the Civil Service, and in the Civil Service Volunteer Rifles, has written to me from South Africa asking me to write a preface to his book. Friendship bids me consent, though I am more than doubtful whether my preface can do his book any good. For his sake I might be tempted to say that a great European Power is planning to invade our shores, that a successful landing in great force can be made in this country at any moment, that it is more than doubtful whether with our present military organisation we can successfully resist any such invasion, and, therefore, that it is every citizen's bounden duty to make himself acquainted with the existing code of war law on land, seeing that at no distant date he will probably be subjected to it. I do not, however, believe any of these things, and therefore I cannot use this special argument in commending Mr. Spaight's work. But his book, I believe, more than justifies itself apart from the possibility of the invasion of these islands. Until civilised societies have ceased to settle differences between nations by the barbarous appeal to force, war is a possibility, and it is the duty of citizens of a world-wide Empire to know its rules in order that they may observe them, whether they have to act as attackers, attacked or neutrals. There are also certain particular reasons which make a strict observance of these rules for the future a matter of great importance. Great Britain undertook at the Hague, in 1907, to issue instructions to her troops on the subject of war law, and to pay an indemnity for any breaches of war law committed by them. Thus, if in the future our troops do not know and observe the laws of war (and on some occasions, as

Mr. Spaight shows, we did not know and observe them during the war in South Africa), their fault will appear in War Office Estimates, and will be felt in the taxpayers' pockets. This country also bound herself at Geneva, in 1906, to bring the rules of the Geneva convention to the notice of the population at large, and the population at large may just as well study them in this book as in whatever way they have been, or may be officially promulgated. And, assuming for the sake of argument the possibility of invasion, if not here soon at any rate somewhere sometime, it will be found that a knowledge of the laws of war is most intimately connected with the status of the citizen who takes up arms in the face of invasion to defend his country. According to the Hague *Règlement* the only conditions which such a man must fulfil in order to be regarded as a belligerent, with all the rights which this entails, are to carry arms openly and to respect the laws and customs of war. If he does not know them he cannot respect them, and it is no defence in the case of war law any more than any other law, to plead ignorance as an excuse. If he does not know and obey the laws of war he is liable to be treated as were the inhabitants of Bazeilles by the Bavarians in 1870, and the Russians of Saghalien by the Japanese in 1904—and in both cases the treatment was most unpleasant.

But quite apart from any special reasons for knowing the laws of war I venture to recommend their study to the ordinary reader as being most interesting, and indeed fascinating. This book makes one at once conscious of the depths of one's own ignorance, and grateful for the chance of putting accurate knowledge in its place. Let the reader put to himself a few elementary questions on war law, and if he cannot answer them he will know that he has much to learn from this book. For instance, Should a declaration of war be made before hostilities begin? What rights has a country against the persons or property of resident citizens of a hostile country on the outbreak of war, who are, and who are not, liable to serve in the hostile army? Does a volunteer enjoy the rights of a belligerent if he acts as part of an armed force, and if he acts alone; if he acts in a country occupied or unoccupied by the enemy; if he destroys railway lines or telegraphs in occupied

country; if he does not wear a uniform? Is guerilla warfare ever contrary to war law? May land mines be used, and if so when? May the residential parts of a town be shelled? Why may you not poison water, but how may you make water poisonous? Which countries have agreed to prohibit the discharge of explosives from airships? May you shoot your enemies' sentries? When may you wear the enemy's uniform? May a soldier dress as a civilian in order to carry or obtain information? Under what circumstances may a country be devastated? May you incite your enemy to desert; and may he refuse the rights of war if he makes prisoner those who have deserted? Can a civilian in a district occupied by the enemy be ordered to make roads or to make cartridges? When must non-combatants be allowed to leave a besieged town, and when may they be prevented? What may you do, and what must you not do under a flag of truce, and during an armistice? When may prisoners of war be shot, and what work may they be compelled to do? If a man gives his parole, breaks it, and is recaptured, how may he be treated? What constitutes military occupation, and does it justify the assumption of sovereignty? Should civil officials remain at their posts in countries occupied by the enemy? May inhabitants of an occupied country be compelled to take an oath of neutrality, or to act as guides? May the Government of the occupying force levy taxes as usual, or impose new taxes? Was England right in the South African war in declaring the annexation of the South African Republics, in setting up concentration camps, and in confiscating and selling farms to pay for the cost of maintaining the families of the owners in the camps?

These questions, which cover no more than a fraction of the ground, are taken almost at random from this book, where they will be found most fully and practically treated. It is, in fact, Mr. Spaight's treatment of his subject which peculiarly distinguishes his work. He is not only a student of war law but of war. He not only examines the writings of jurists, the conferences and conventions, but he reviews all the wars which have taken place between civilised peoples in the last sixty years for precedents and examples bearing on each question. This treatment makes every point peculiarly living and vivid.

The slow, but steady march of reason and humanity can be traced on almost every side. The field for further progress is clearly marked out. As we read we may compare the practice of the earlier wars with that of the later, and both with the law as now accepted, and with proposals made which are at present too advanced for general acceptance. And the result is gratifying to a lover of peace, and well worth tracing out in these pages. The old rule that all is fair in love and war becomes ever wider of the truth as far as war is concerned. War becomes more and more hedged about with an elaborate ritual punctiliously observed. The civilian is more and more left on one side to pursue his ordinary avocations while the struggle of those whom he pays to decide his disputes rages over his head. Will not these civilians some day come to see that this method of gladiatorial arbitrament is equally barbarous, ruinous and unjust? And will not war between civilised nations then become as much a practice abandoned as trial by battle—for the government of countries is in civilian hands, and civilians can decide it so? I believe that this book, by showing us in what position we now stand, and whither we are moving, may bring that day nearer. If it does so by ever so little it will have been written to good purpose.

FRANCIS D. ACLAND.

CHELSEA, *January*, 1911.

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WAR RIGHTS ON LAND

CHAPTER I

INTRODUCTION

AN individual who is a member of any organised State community has certain rights as against the other members of the State, and the other members and the State have certain rights as against him. This is only another way of saying that a citizen has certain rights and obligations. As an English subject I have a right to personal freedom from molestation, to my property, to my reputation, &c., and I must respect the similar rights which other subjects possess. If they interfere with my rights, or if I interfere with theirs, they or I commit what is obscurely called a "tort." If I infringe the rights of the State as against me—if, for instance, I break the King's Peace by committing treason or forgery, or if I go so far as to keep a Colorado Beetle, I commit a "crime." In both cases, the State machinery can be set in motion to secure compensation for the breach of the rights infringed by the tort and the crime. It is the State authority which enforces all such rights, or, in the language of jurisprudence, supplies the "sanction."

Clearly to understand the nature of war rights, one must imagine, not such an organised State community as England or any other developed country, but a very primitive condition of society, like that which Hobbes postulated, in which "every man is a wolf to his fellows," or, if one prefers Locke as philosopher and guide, in which each individual goes about with a "sedate, settled design" on his neighbour's life. In this pleasant community, there would be no established State

Rights
under
National
Law.

Rights
where
there is no
State.

authority to make laws and enforce them. Internecine and continual strife would be the normal condition of things. But in the course of time, assuming that no ruling power is set up as the arbiter and conservator of peace (and this assumption is not an extravagant one but closely analogous to the conditions of International Law as between sovereign States), the self-interest of individuals would recognise the advantage of a few broad rules, founded on compromise and limiting the extreme licence which had hitherto prevailed; rules, for example, respecting truces, or the indiscriminate slaughter of women and children, or the burning of temples, or the attitude of third parties towards conflicts in which they were not immediately concerned. No means of enforcing these rules would exist; the only influences making for compliance therewith would be the conscience of each individual and the more potent motive of fear of reprisals in kind for any breach of them. The only ultimate means of redress would be self-help. Still, though a "sanction" should be lacking, the rules adopted would supply a standard of conduct, to which there would be a fairly close approximation in practice. One might not be able to call on any State authority to enforce one's rights but they would nevertheless have an existence and recognition not the less real for being founded on an insecure foundation.

War
Rights
may be
compared
with
these
latter
rights.

Such rights, based not on authority but on compromise, enforced not by a law-giver but by each aggrieved individual himself, find a close enough parallel in the War Rights which are the subject of my book.¹ The relationship of the armed forces of one nation to the armed forces and population of another independent nation is very like that of the individuals, *inter se*—the masterless men—in the primitive community I have tried to describe. Within their own boundaries, the soldiers and civil inhabitants of each State have various rights and obligations founded on the laws of the State and enforced

¹ See *United States Instructions for Armies in the Field*, paragraphs 40 and 41:—

There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

All municipal law of the ground on which armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

by State officials. Apart from war rights, they have no such rights and obligations towards the soldiers and inhabitants of an enemy State. There is no common law comprising within its jurisdiction the diverse units which are the instrument and sport of war. Primeval war, naked and unashamed, knows of no right but the right to kill. But just as the individual of a primitive unorganised community may be supposed to adopt certain rules, based on mutual forbearance, to regulate their internal wars, in like manner and for similar reasons modern States have established a body of usages to regulate the conduct of armies and populations in international wars. Some of these usages have pride of lineage, and trace descent from classical times or the age of chivalry; others are born of the development of modern scientific war. Like the customary rules of the primitive community, they have no sanction in the last resort save self-help. War law is an imperfect law; for whether law exists before the State, or whether without the State there can be any law (which is, for my present purpose, about as useful a matter for discussion as whether the egg or the chicken came first), there is no doubt but that the ultimate power of the law within any State depends on the ability of the State to enforce it, and that a law unsupported by the sword of State is an imperfect law.¹ There is no international tribunal which will force a nation to observe the usages which the general sense of nations has approved. "The law of nations has not fleets nor armies of its own to make itself respected."² Any nation can at any time throw war laws to the winds. But no nation does. The logical supplement to the golden rule which warns us that as we do, so shall we be

¹ Sir F. Pollock says (*Jurisprudence*, p. 13) that we are not called upon to consider whether International Law is most akin to (1) national law, (2) purely moral rules, or (3) those customs and observations of an imperfectly organised society which have not fully acquired the character of law, but are on their way to become law. They have characteristics of each of these three categories, but are, I think, most akin to the third, to which they may usefully be compared for the purpose of illustrating their essential nature. Professor Holland describes International Law, which he classes under the "Adjective law of nations," as "the vanishing point of jurisprudence," since it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves. (*Jurisprudence*, p. 333 ff.).

² Lieutenant-General Den Beer Portuagel in *Revue des Deux Mondes*, 1st November, 1901, p. 59.

done by, is the chief motive for the compliance of civilised States with the usages of war. Another motive is found in the national conscience and sense of justice—"the instinct of the just and the unjust," which, as Maeterlinck says, pervades all humanity. "The grand word, Ought," is not necessarily expunged from the vocabulary of nations at war. Despite its weakness on the coercive side, International Law is a very great and real restraining power which no nation can afford to disregard. Good name is a valuable asset for a nation as for an individual. War being but a passing phase in a nation's life—the fire in which peace is consumed to be born anew of its own ashes—a nation should not, and does not, cast away its regard for its reputation when it casts away its scabbard. War laws are often broken—are not municipal laws broken too?—but no modern nation is bold enough or strong enough to disregard them wholly. To do so would be to extend to every latitude in war time the doctrine of the old buccancers that there was neither God nor treaty within thirty degrees of the Line.¹

War law a
reality.

The International Law of war has had its detractors, who have derided its authority and even questioned its existence. The late Lord Salisbury said "it depended generally on the prejudices of the writers of text-books"; as if common law did not depend on the prejudices of judges and equity on the prejudices of chancellors. The French Admiral Aube spoke in a signed review article of "that monstrous association of words, the laws of war": implying that war cannot admit of any restraint, but must necessarily be an appeal to wholly unbridled force. Such a position is merely unconsidered swash-bucklerism. There is no nation which has not rendered homage to the laws of war. Had such laws no existence and no authority, wars would be, as between belligerents, sheer butchery, massacre, annihilation, like the wars of the Children of Israel long ago or the modern Afghans and Apaches; and as between belligerents and neutrals, world-conflagrations involving all nations sooner or later. War law is the only law which covers

¹ For an example of what even a modern (nominally) civilised struggle can be when neither party recognises any war rights in the other, I recommend Mr. Loraine Petre's *El Libertador*, which describes the war for freedom waged by Bolivar and his men—mostly Creoles, but with an intermixture of men of pure European blood—against the Spanish troops in S. America.

"like the vault of heaven," as a great French statesman said, all civilised nations with the benign authority of its humanity and order. It needs no apologist for its existence and utility. Can anything be more vitally real and beneficent than the power which has been able to abate even in a slight degree the wrath and violence of war? To say, as one writer does, that "the laws of war make one think of the snakes of Ireland,"¹ is to be epigrammatic at the expense of truth.

Indeed, history gives a full and complete denial to those who question the reality and authority of war law. Every modern war has seen its principles and rules recognised. There have, it is true, been instances of strained interpretations and questionings of the applicability to given circumstances of certain of its rules, but such instances are only further evidences of the recognition of a universally binding system of war law. No nation has deliberately gone about to override International Law as a whole. Belligerent States may violate it occasionally, but they do not challenge its existence and authority; rather, they try to justify their actions by a reference to the principles of the particular law, conventional or customary, which they are accused of infringing. And it cannot be that violations of war law are not heard of by the world at large. Wars, to-day, are fought under the eyes of foreign military *attachés* and Press correspondents, and the most stringent censorship cannot prevent the reports of these neutral eye-witnesses at length reaching the War Departments or newspapers by which they are commissioned. *Attachés* and correspondents, especially the latter, do in fact go a long way towards fulfilling the rôle which the Institute of International Law (in its session at Zurich, 1877) suggested that military *attachés* should be assigned by International agreement, namely, the rôle of a "jury of honour" who should report to neutral Governments any infractions of war laws committed by the belligerents.² The suggestion is an excellent one and is to be hoped that some future conference may see fit to sanction it and thus grant the official approval of the Cabinets to a practice which is already to some extent carried out unofficially.

¹ Farrer, *Military Manners and Customs*, p. 2.

² See M. de Martens, *La Paix et la Guerre*, p. 552.

Influences making for the observance of war law.

The self-interest, then, of nations and their regard for their world reputation are influences making for the observance of the laws of war. A further influence is the recognition of the obvious advantage of having a known body of rules dealing with a subject of much doubt and difficulty; in other words, of having war usage standardised. Again, in most modern States, the balance of political power between two or more parties furnishes another safeguard for the observance of war law. Ministers are ultimately answerable in constitutional States for the actions of the national troops, and if the "Big-Endians" are in power, the "Little-Endians" will not be slow to make political capital out of any lapse from correct international usage committed by the country's forces. Compliance with war law is thus sometimes secured indirectly through what is primarily a party move.

Attempts to draw up a code of war law.

There is no complete code of war law. Several attempts have been made to draw up such a code but never with complete success. In 1874 the representatives of the European Powers met at Brussels to consider the question, and though unanimity was reached on many points, many others were left undecided and some were not discussed at all. The Brussels project, containing the articles to which the delegates agreed, was never ratified owing to the opposition of the British Government.¹ It has, however, had from the first a great moral influence on the conduct of armies, embodying as it does "the most authoritative opinion of tacticians, diplomatists, and jurists on the laws and customs obligatory for belligerent States and their armies."² In 1899, a further conference of representatives, held at the Hague, reconsidered the Brussels project, and the result of their labours was the completion of a *Règlement* or series of regulations, which the Powers agreed to embody in their respective Army regulations. This *Règlement* is the nearest approach to a complete code of war law. The fact that it was approved as an annex to a Convention instead of being made part of the Convention itself has militated against its effect. The Powers who sanctioned the *Règlement* are not bound by its terms, as they are by those of

The Brussels Conference.

The Hague Conference 1899.

¹ See M. de Martens, *La Paix et la Guerre*, Chapter III.

² De Martens, p. 120. See Hall, *International Law* (Atlay's Edition), p. 524).

the St. Petersburg Declaration and the Geneva Convention; their undertaking is to issue instructions to their troops "in conformity with" the articles of the *Règlement*, and some of the Powers have interpreted the intention of this undertaking very loosely. There is not, it is true, any power given to the several Cabinets under the agreement to pick and choose from the articles and to omit or modify such of them as each Cabinet deems to clash with national interests.¹ A proposal to this effect was made at the Hague by the British military delegate and withdrawn on general opposition being offered to it. But the provision as to conformity and the fact that the text of the *Règlement* is not binding, have been taken by some of the signatory Powers as a reason for doing precisely, in effect, what Sir John Ardagh proposed. "A *Règlement* annexed to a diplomatic treaty," says an eminent French jurist, "has always somewhat of the character of a simple 'act of execution' which the contracting parties assume power to modify without touching the Convention itself."² It is for this reason that Germany in her official manual of the laws of land war (*Kriegsbrauch im Landkriege*, Great General Staff, Berlin, 1902) lays down that a *levée*, to be recognised as a proper combatant body, must not only fulfil the conditions which were sanctioned at the Hague for the admission of such bodies to belligerent rights, but also the additional conditions for regulars, militia, and volunteers. This may be a reasonable and proper requirement, but it is certainly a departure from both the spirit and the letter of what Germany pledged herself to at the Hague. The British Government, too, appears to regard the *Règlement* as an 'act of execution' or rather, perhaps, as an ideal theoretical standard to which belligerents, ought, if possible, to conform in war. In the "Field Service Pocket Book," issued by the War Office and intended as a handy book of reference for officers on service, a summary of the Hague regulations appears under the following heading (p. 155):—

These Regulations are intended as general rules of conduct, so far as military necessities permit; they have not the force of an International Convention.

¹ See Blue Book, "*Miscellaneous* No. 1 (1899)" (which will be referred to as "Hague I B. B."), pages 140, 142-3. De Martens, p. 100.

² Pillet, *Les Lois actuelles de la Guerre*, p. 453.

It is perhaps unfortunate that special notice should thus be invited to the very elastic prerogative of the necessities of war (the "ill-defined exception of military necessity," to use Mr. Dudley Field's phrase), which is, of its very nature, very far from being given to silence and self-effacement when it happens to come into collision with international agreements. In any case, the heading of the summary is open to the serious objection that it is incorrect to state generally that the Hague Regulations are subject to military necessities. Some of the rules are so subject—for instance, those which lay down that private property, or religious institutions, are to be respected. But the most imperative military necessity could not justify the use of poison or the torture ("inhuman treatment") of a prisoner of war, or assassination.

The
Hague
Con-
ference
1907.

A second Conference was held at the Hague in 1907. At this some of the Articles of the 1899 *Règlement* were slightly modified and an important Convention was drawn up, dealing with the war rights of neutrals. The *Règlement* of 1899 had already a chapter on the subject of the internment of a belligerent's troops in a neutral country. This chapter was removed from the *Règlement*, and, together with a number of fresh provisions dealing with the rights and duties of neutral Powers, the obligations of neutral individuals, and the requisitioning of neutral railway material, was made the subject of a distinct "Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land." It was also provided that an indemnity should be paid for any breach of the *Règlement*—a provision which will doubtless check the tendency towards a loose construction of the undertaking as to the conformity of instructions to the terms of the *Règlement* as passed by the delegates. The principle of monetary compensation, which is not found in the St. Petersburg Declaration or Geneva Convention, and in the Hague Regulations of 1899, was sanctioned only for minor breaches of armistices and for the seizure of railway plant, etc., belonging to companies or private persons, is bound to make for the observance of war law, not so much on account of the material loss which a violation may entail as because of the moral effect of the fact of violation being proved and brought home to the offending State.

Not only have the Conferences of Brussels and the Hague supplied, in the final *Règlement*, an authoritative text of the laws of war, but the *procès-verbals* of the three Conferences furnish a very valuable commentary on the text and throw much light on points on which no agreement was reached. "The Protocol (*procès-verbal*)" said Baron Jomini, the President of the Brussels Conference, "is the living commentary on the text and as much law as the text itself."¹ "The Protocols will, in the event of war," said the Russian Government in a despatch relating to this Conference, "be consulted as evidence of a great moral value."² It is frequently very instructive to compare the original draft of the Brussels Conference with the text eventually sanctioned by the delegates and to watch the process of the manufacture of the raw material supplied by the Russian Project into the finished product of the existing Hague *Règlement*. I shall make constant use of the Protocols of the Conferences in discussing war law under its various headings. The Brussels debates are especially valuable, for one finds in them a fresher and more thorough and comprehensive examination of the problems of war law than the later debates supply. The delegates at the Hague were able, by virtue of their predecessors' labours, to take much for granted, to assume first principles, to improve and modify rather than to dissect and analyse; they had no need to attack the roots of each question, to treat it *ab initio*, as the earlier delegates had. The Brussels Protocols, much more than those of the later Conferences, deal with the elements of the problems of war law, and therefore, although the text to which they are a commentary differs in some respects from the *Règlement* of 1907—the last word in conventional war law—they must always remain a veritable store-house of information for a student of the subject.

Other points of war law are dealt with by the St. Petersburg Declaration of 1868 (renouncing the use of explosive projectiles under 400 grammes in weight), the Geneva Conventions of 1906 (for the amelioration of the condition of the wounded and sick in armies in the field) and the Conventions of

¹ See Blue Book "*Miscellaneous* No. 1, 1875" (which I shall refer to in future as "Brussels, B. B."), p. 244.

² Blue Book "*Miscellaneous* No. 3 (1875)."

1907 as to the opening of hostilities and as to neutrality. The Geneva Convention of 1906 has replaced the earlier Convention of 1864.

Unsettled questions. Many questions of war law remain undecided by international agreement. As to these, the delegates at the Hague Conference of 1899 made the following important declaration:—

It has not been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.

On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military Commanders.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of International Law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.

They declare that it is in this sense especially that Articles I. and II. of the Regulations adopted must be understood.¹

In order to discover what are the “principles of International Law” to which the delegates refer in this passage, one must have recourse to the Protocols mentioned above; to the manuals of the laws and customs of war which many individual Governments have issued to their troops²; to the published proceedings of the Institute of International Law, and especially to the *Manual of the Laws of War on Land* which was drawn up

¹ Hague I B. B., p. 316.

² American, *Instructions for the Government of the Armies of the United States in the Field* (1862); French, *Manuel de Droit International à l'usage des officiers* (1877); Russian Ukase of 1877 (see Holland, *Studies in International Law*, p. 86, and de Martens, p. 216 ff.); German General Staff, *Kriegsbrauch im Landkriege* (1902); British, *Laws and Customs of War on Land, as defined by the Hague Convention of 1899* (Edited, Prof. T. E. Holland) (1904). The editions of the British *Manual of Military Law*, from the first edition, of 1884, to the fourth, of 1899, contain a valuable chapter by Lord Thring on the laws and customs of war. The *Manual* is an ordinary publication of the Stationery Office, and has been on sale to the public since 1884. Dr. Lawrence is therefore in error when he says: “The corresponding British code (*i.e.* of war laws) has not been published, but Sir Henry Maine was permitted to quote from it largely in his *International Law*” (*International Law*, 3rd Edition, 1905, p. 378, note).

by that body at its Oxford session in 1880; to the writings of jurists; and most of all, to the examples, precedents, and warnings which are furnished by the actual occurrences of modern war. All these sources of information are doubly useful to a student of war law; for where an International Convention exists on any point, they explain it, enlarge upon it, show its bearing in practice, clothe it, as it were, in flesh and blood; and where there is no Convention, they are evidence of the existence of certain usages, which, be it remembered, rest upon the same sanction as conventional war law, that is, the conscience of each individual nation. The whole domain of war law is so full of uncertainties and complexities that, if one had to depend on the Conventions alone, one would find, not only that there are great gaps in the subject, where settled rules have not been arrived at, but that even on points which have been legislated for, the practical interpretation is in many cases so doubtful and difficult that one must have recourse for guidance to authorities other than the Conventions themselves.

It will be seen that I have used the last-named source—the events of history—very freely for defining, explaining, and illustrating all the many questions presented by a study of modern war rights, whether depending on convention or on usage. A few words are necessary in regard to the wars which have furnished me with material for precedent or warning. It may be thought that a general examination of the wars since 1850, such as I have attempted, however useful for guidance on problems which are still in the domain of usage, cannot be of much utility as regards the problems which have been settled by international agreement. The first Geneva Convention, of 1864, had not been promulgated when the Crimean War was fought, and when it was given to the world the American Civil War was nearly over. The Hague Conference of 1899, and even the Brussels Conference of 1874, were held long after the Franco-German War. The Seven Weeks' War is rich in instances of the war right relating to Requisitions, but, since that war was fought, the question has been threshed out and stereotyped at Brussels and the Hague. According to this view, the only war which could be admitted as supplying illustrations of the Hague *Règlement* would be the

The historical method of treatment.

Russo-Japanese War of 1904-5, for the Transvaal and Orange Free State Governments were not parties to the diplomatic act referred to. As the Hague Regulations contain much the greater portion of conference-settled war law, one would be thus debarred from offering the historical events of practically all modern wars as a commentary on the war rights which they do, as a matter of fact, illustrate. But there is no good ground for taking such a view of the matter. The Hague Conference did not create any fresh principles of war law; it only sanctioned existing usage. "On its important points," says Professor Despagnet of Bordeaux University, "the Hague *Règlement* only specifies precisely the dispositions already admitted by all civilised nations without any dispute."¹ The Hague is practically a reiteration of the Brussels Project, which "sought to seek out whatever in International Law was capable of being stated precisely, defined, rendered complete, and to acquire therefor, by means of an exchange of declaration between the Cabinets, a sanction which should be binding."² "The Conference," said the president at Brussels, "has no other end than to consecrate rules universally admitted."³ The preamble of the Hague Convention of 1899 expressly states that the provisions of the *Règlement* were framed with the intention of "defining and regulating the usages of war on land." There was no cancelling of an old code and promulgation of a new one. The aim (and the effect) of the Hague Conference, and of the others in like manner, was to turn a war right depending on usage into one depending on international agreement. To a large degree, the Conference aimed at creating a "Society of Mutual Assurance" against the abuse of force, by giving an international authority to such restrictive rules as humane Governments and commanders in the field have found desirable and feasible in practice. The statesmen, soldiers, and jurists who compiled the *Règlement* took as their materials the accumu-

¹ Frantz Despagnet, *La Guerre sud-africaine au point de vue de Droit international* (1902), p. 219.

² Russian Government's despatch in Blue Book *Miscellaneous* No. 3 (1875), p. 5.

³ Blue Book *Miscellaneous* No. 2 (1875), p. 4. See also De Martens, p. 240, who states that the Brussels Conference "only consecrated usages already recognised."

lated experiences of modern military history. They condensed the events of war which are pertinent to the subject into the *Règlement* as it stands to-day, and the student of war rights must follow a like historical method if the *Règlement* is to be for him something more than a formula or a cold abstraction, divorced from the reality of war. There is hardly an article of the Hague Regulations which may not be matched by an instance in prior wars of strict compliance with its provisions, and where usage has varied on any point, it is instructive to trace the historical, practical reasons which led the Conference to adopt one solution and reject the others.

Among the wars which I have examined for the purpose of my work is the American War of Secession, which was not strictly an international war. As war rights can only come into play between the armies and populations of independent Sovereign States, it would seem that this particular war is of questionable value for my purpose, seeing that the sovereignty of the Confederacy was not recognised by the Washington Government. Technically, the Secessionists were rebels, like the Sepoys in the Indian Mutiny. But practically, they were treated as belligerents, and both sides, throughout the struggle, respected the principles of International Law. The Washington Government could not do otherwise. The early stages of the war went in favour of the Cotton and Border States and left a host of Union prisoners of war in their hands, on whom retaliation would have been provoked by a refusal to treat the Southern armies as lawful belligerents.¹ The Secessionist Government had no incentive to regard the Northern Government as other than an independent community, a federal body of States from which the Confederacy had severed itself for ever. An amusing indication of the general attitude of the South on this question of severance is the fact that New

The American Civil War and its bearing on war law.

¹ "The Supreme Court decided in the case of the *Amy Warwick* that the Confederates were at the same time belligerents and traitors, and subject to the liabilities of both. In practice, however, they were treated as belligerents throughout the struggle" (Lawrence, *International Law*, p. 303). The Confederate Government did successfully use the threat of reprisals on Union prisoners to deter the National Government from treating the crew of the *Savannah* privateer as pirates. See Draper, *History of the American Civil War*, Vol. III, p. 498.

York news was published in the Richmond newspapers under the heading "Foreign Intelligence." Indeed, in many respects the Secession War is the most instructive of all wars to the student of International Law. Just as this war gave modern fighting many of its distinctive features—the cavalry screen, the use of rifle-pits and wire-entanglements, the employment of mounted infantry, the attack by short advances under cover—so it gave belligerents the first written code of land war. This was the very remarkable manual of *Instructions for the Government of the Armies of the United States in the Field*, which was drawn up by Professor Lieber, on Mr. Lincoln's initiative, and which is not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative. Its principles and its philosophy are sound, elevated, and humane. In a few special points its detailed teachings have been modified by the subsequent action of International Conferences or the influence of changing ideas on usage, but, taken as a whole, it reads like an admirable paraphrase of the existing Hague *Règlement*. Any student of war law must find, as I have found over and over again, that its teachings throw a flood of light on the dark places of International Law. It passed through its ordeal by fire in the grim struggle of 1861–5 and was not found wanting. Apart from the devastation of Georgia and the Carolinas by Sherman and of the Shenandoah Valley by Sheridan—devastations which were made militarily necessary by special circumstances, just as was the devastation of the Transvaal in 1901–2—the conduct of the Union forces, almost wholly composed of civilians with no previous training or discipline, compares more than favourably with that of regular armies in European wars.

The South
African
War also
useful.

Another war which I have used is the Anglo-Boer war of 1899–1902. The British claim to suzerainty over the Transvaal may seem to place this war outside the category of conflicts between sovereign States. Whether one thinks with Professor Despagnet that suzerainty depends on a treaty and that, when this tie is snapped by the outbreak of war, the countries concerned are in the position of independent States,¹ or whether one regards the case as abnormal and one to be considered on

¹ See T. Baty, *International Law in South Africa* (1900), pp. 66–8.

its merits and the circumstances, the fact remains that both belligerents carried on the war with constant reference to the principles of International Law. The Blue Books and State Papers issued on various points which arose during the conflict prove this fact abundantly. England recognised the Boers as belligerents, and if, while doing so, she maintained her right of suzerainty to justify certain lines of action which would hardly be proper in a war between completely independent States, her attitude on these points (to which I shall be very careful to draw attention as being exceptional and without authority as a precedent) is instructive by reason of its very divergence—admitted by jurists and statesmen—from the strict rule of international usage. Generally speaking, the laws of war were observed by both belligerents, and that is sufficient reason for a careful study of the war by a student of International Law.

The other wars with which I have dealt call for no special mention, for the few references I make to the Indian Mutiny and the Boer War of 1881 are for the purpose of showing the military *raison d'être* behind certain war rights, not to furnish evidence on contentious questions of usage. The status of the parties in these conflicts is therefore immaterial. I have not thought it advisable (except in a very few cases) to go back to the Napoleonic wars, rich though they are in illustrations of war rights. To have done so would have swelled still further an already large volume, and if the latter wars have not yet acquired the perspective and light and shade in which history shows up the right and wrong in men's actions, their modernity makes them a more profitable theme for the study of existing war rights. One thing I claim proudly, and it will seem a matter for pride to those who have read as many text-books on International Law as I have: there is no mention in my book, except this, of the "Affair of the Caudine Forks."

The following articles of the Hague Convention of 1907 respecting the laws and customs of war on land, to which the *Règlement* is an annex, may here be conveniently given:—

ARTICLE I.

The Contracting Powers shall issue instructions to their armed land forces, which shall be in conformity with the

Examples
drawn
from
modern
wars
generally.

The
Hague
Conven-
tion of
1907, as to
the laws
and
customs
of war on
land.

Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

ARTICLE II.

The provisions contained in the Regulations, referred to in Article I. as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

ARTICLE III.

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Complete indifference to war law in the British Army.

Other articles of the Convention refer to the ratification of the Convention, to the adhesion to it of non-signatory Powers to the date of its coming into force, and to its denunciation. Article I. and Article II., with modifications, are reproductions of the Convention of 1899: Article III. is new. This last Article, with its assertion of the responsibility of Governments for the action of their agents—the forces in the field—and its provision as to the payment of an indemnity, may perhaps have the effect of saving Article I. from being a dead letter so far as Great Britain is concerned. It may, that is to say, result in the *Règlement* being studied in the British Army. At present, it is not. It forms no part of the promotion examinations in our army; there is an apparent exception in the case of promotion to Lieutenant-Colonel in the Royal Army Medical Corps, but that is due to the *Règlement* and the Geneva Convention being contained in the same service manual, for with the *Règlement* itself doctors have no concern, and they are only examined in the portion of the manual which deals with the Geneva Convention. Instructions have been issued, it is true, to the armed land forces, but no one reads them. No one would dream of reading them. I shall give what I submit is a perfectly fair instance to show how little is known of war law in the English Army. In the *Journal* of the *United Service Institution* for May, 1909, will be found a letter from an officer whose mind is evidently exercised about the war right of “belligerent qualification,” as raised in the case of *Mr. Brown*, the *dramatis personâ* in *An*

Englishman's Home who is summarily shot on capture for using a rifle to defend his home. He asks whether *Mr. Brown* is not entitled to combatant rights seeing that the "Geneva Convention" (*sic*) grants such rights to populations who rise on the enemy's approach, without having had time to organise themselves in the usual way, and he points out that *Mr. Brown* had not had time to "organise himself or anyone else." (*Mr. Brown*, I may say, was properly punishable with death: though one may doubt whether even the War Department of "Nearland" would have permitted a cavalry captain to condemn an inhabitant to death without any form of trial.) The officer who writes this letter belongs to one of the keenest regiments in the Army List: yet apparently he had no one in his regiment to set him right on this point—a point which any officer might have to deal with at any time in actual war. Many causes are at the bottom of the general neglect of the study of war law. The time of officers is fairly well occupied, nowadays, in regimental duties and training work. They say, who know, that the British Army is a finer engine of war to-day than it has ever been. Most gladly and thankfully I accept that statement; yet I am entirely and most sincerely convinced that one small, not unimportant, though neglected, part of the machinery needs oiling and attention. War law has never been presented to officers in an attractive form, as it might have been (I submit with diffidence) if the writers had insisted on the historical, human, and practical side rather than on the legal and theoretical one. But the difficulty of the subject, and the necessity for a careful study of it, have not been brought home to officers: they underestimate its importance and complexity. And in saying this I am not forgetting that a young officer wrote a book on the subject a few years ago. Indeed I think that fact supports my contention. Professor Holland's admirable manual was already in existence, so that this book—in part a transcript, in part a paraphrase of the *Règlement* and the Geneva Convention—was hardly necessary. It cannot have taken much more than three weeks to write. There is nothing in it to show that any prolonged study or specialised knowledge went to the making of it. It is clearly not the work of one who took the subject seriously himself or thought others would take it seriously.

Indeed I cannot help thinking that the book's *raison d'être* is simply this—that for an ambitious subaltern who wishes to be known vaguely as an author and, at the same time, not to be troubled with undue inquiry into the claim on which his title rests, there can be no better subject than the International Law of War. For it is a *quasi*-military subject in which no one, in the army or out of it, is very deeply interested, which everyone very contentedly takes on trust, and which may be written about without one person in ten thousand being able to tell whether the writing is adequate or not.

Import-
ance of
war law.
(1) To the
soldier.

Yet, assuredly, this matter touches the honour of the nation and the army. The very lightest claim that the *Règlement* has to attention—that it is the accredited manual of the etiquette of war—ought to insure that it is studied. But its claim is a thousandfold stronger than this: it is the charter of war, the statute right which armies carry, as it were, on their bayonets, and which runs in every civilised land where hostilities are waged. If war is not simply unbridled force, if it is something more than a glorified “rough and tumble,” a savage *mêlée* which knows no mercy or moderation, it is so because of the rules which have their authoritative expression in the Articles of the great Conventions. They are the measure by which war is removed from barbarity. To observe them is not to blunt one's sword; no nation ever complied more strictly with war law than Japan in her war with Russia, yet no nation ever fought more sternly, more devotedly, more successfully. Modern fighting has become a disintegrated, isolated, straggling affair, spread over a vast space of country and directed from a multitude of practically independent centres; and any officer may at any time be called upon to decide some question of the war right of his own side or the enemy's in a particular case. If he decides wrongly, he damages his country's cause, not only in reputation but in pocket—for there is the indemnity to be considered. The officer is regarded, quite properly, as his Government's agent, and the latter—his principal and employer—will hardly favour a servant whose ignorance makes his employment doubly damaging and costly.

(2) To the
civilian.

And the orbit of war law, be it remembered, extends beyond the armies in the field. It affects the civilian inhabitants of

invaded or occupied countries too, and it affects them more intimately and potently than the easy law of peace. It is a law one may not trifle with, a law which smites with scorpions and which utters its injunctions and commands along levelled rifle-barrels. With this law every citizen of every country ought to make himself familiar. If ignorance of the law is no excuse in peace, it is far less an excuse in war, when punishment follows sharp and swift on any transgression, whatever its motive. The citizen who is wise ought to make it his business to learn betimes the law which will govern him if or when the enemy is at the gates. (And no land is entirely safeguarded from the danger of invasion: history teaches that it is crass folly for any country to think itself set permanently above the tide-mark of war.) And in this extended orbit of the law of war to non-warlike individuals, the professional soldier ought to find a further reason for studying the subject gravely and carefully; for he will be the judge—not a juror who may know nothing of the law and is merely an arbiter as to fact—but the judge who will have the lives of men in his hand as completely as the criminal judge of peace-time. It is futile to hope, of course, that one will ever find in the judges of war law the specialised knowledge, the trained and balanced judgment, the discrimination in handling authorities and evidence, which one expects to find and does find in the judge of assize. The conditions of war and peace are too different for that. But there is no reason—absolutely none whatever—that a good working knowledge of war law should not be acquired during peace, by those who will have to administer it in war. We do not wait till hostilities break out to drill men, and drill is less hard to master than war law. It cannot be right that there should be any possibility left of life and death being adjudged to free citizens by judges who are ignorant of the code they administer.

CHAPTER II

THE COMMENCEMENT OF HOSTILITIES

Conventional Law of War, Hague Convention, 1907,
Articles I. to III.

ARTICLE I.

The Contracting Powers recognise that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war.

ARTICLE II.

The existence of a state of war must be notified to the neutral Powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph. Nevertheless, neutral Powers may not rely on the absence of notification, if it be established beyond doubt that they were in fact aware of the existence of a state of war.

ARTICLE III.

Article I. of the present Convention shall take effect in case of war between two or more of the Contracting Powers.

Article II. applies as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

A formal
declara-
tion not
the prac-
tice in the
past.

THE provision as to the opening of hostilities, given above, is contained in a separate Convention and does not form part of the Hague *Règlement*. Therefore, although it marks a change in practice, it is no exception to my general remark that the effect of the Hague *Règlement* has been solely to legalise existing usage. Many modern wars have been begun without either a declaration or an ultimatum amounting to such, and one cannot deny that, in practice, a formal

declaration has not been customary in modern times. Theory on the subject is divided. English jurists have, as a general rule, taken the view that no declaration is necessary—that, if given, it is a vain formality—and that a blow may properly be struck before either declaration or manifesto is issued. In the Prize Court case of the *Eliza Ann*, Lord Stowell laid it down that war might exist without a declaration on either side. “A declaration of war was not a mere challenge to be accepted or refused at pleasure by the other. It proved the existence of actual hostilities on one side at least, and put the other party also into a state of war, though he might, perhaps, think proper to act on the defensive only.”¹ Lord Stowell’s judgment does not, of course, decide the question as to whether a declaration ought or ought not to be issued; all that it decides is that war may exist without a declaration, which is merely the evidence of a state of fact. But it is certainly true that English jurists have mostly failed to confine the principle laid down by the great Chancellor to its proper and natural domain. They have argued that, because a declaration is not necessary in order to “legalise a war,” it is therefore not necessary at all. According to the British school of writers, whatever reasons there may have once been for a solemn declaration of hostilities (the chief being the practice of foreign enlistment and the necessity of recalling citizens who were serving in other armies to their national standard),² the need has ceased to exist with the modern improvements in the means of communication. “The rupture of diplomatic relations,” says a representative English jurist, “is the constant precursor of armed conflict. . . . Unless the first blow falls like a bolt from the blue, in a period of profound peace, without previous complaint or demand for redress, there is nothing in it that savours of treachery.”³ The acrimonious discussion which accompanied the commencement of the Russo-Japanese War shows, however, that even when prolonged diplomatic negotiations have taken place, the blow struck by the readier belligerent may be construed by the other

¹ Pitt Cobbett, *Leading Cases in International Law*, p. 152.

² F. E. Smith and N. W. Sibley, *International Law as Interpreted during the Russo-Japanese War*, pp. 53-4.

³ Lawrence, *War and Neutrality in the Far East*, pp. 28-9.

Desira-
bility of a
declara-
tion.

as a treacherous attack; and the very fact that a complaint of treachery is possible, whether well founded or not, is an argument in favour of a declaration. The Continental jurists have been very strongly in favour of a declaration. One of them has, quite unjustly, ascribed the English doctrine to unworthy motives. "England," says Professor Louis Le Fur of Caen, "having almost a monopoly of the telegraphic cables of the world, and possessing squadrons in every sea, finds in this practice [of dispensing with a declaration] a considerable advantage. She can strike damaging blows at her enemy's commerce the moment hostilities open, capturing ships and sailors before they are even aware of the rupture of peaceful relations."¹ The European view is ably expressed by M. Bonfils, who says:

Acts done before the declaration have a doubtful character. Are they real hostilities, or merely unauthorised attacks? A State which has not been warned and which sees its frontiers attacked, would be authorised in regarding the hostile soldiers and sailors as merely bandits or pirates committing an act of aggression, and in applying to them the national laws dealing with brigands, instead of the laws of war.²

View of
the Hague
Com-
mittee.

It was the European view which was approved at the Ghent session of the Institute of International Law in 1907, and received official international sanction in the same year at the Hague, when, indeed, it received the support of the British delegates. The Committee which examined the question at the Hague drew up a very valuable and interesting report on the subject, in which it expressed its concurrence with the view that a declaration of war was desirable, both to settle the uncertainty existing on the point, and to remove a frequent cause of recriminations between belligerents. It suggested that the declaration of war should be a reasoned one (*motivée*), "in order that everyone in the two countries which are at variance as well as in neutral countries, should know what the war is about, and that it might be possible to form a judgment on the conduct of the adversaries. It would, of course, be visionary to suppose that the true cause of the war will always be indicated: but the

¹ In *Revue de Droit international public*, July-August, 1898, p. 672. (In future I shall refer to this *Revue* as R. D. I.)

² Bonfils, *International Law*, sec. 1031.

difficulty of stating the causes, the necessity of putting forward causes which may have no foundation or which may be altogether out of proportion with the very fact of war—this is bound to draw the attention of neutral Powers and to enlighten public opinion.”¹ One may see in these words, and in the Convention itself, a remarkable instance of the growth of Internationalism; for there is here a covert blow at Caesarism, an appeal from the executive of a nation to its people, its sane democracy, its educated electors, who hold the public purse-strings and without whose backing no nation could fight for a day. It is a new thing in International Conventions to recognise in others than kings and generals the existence of a conscience. Upon the question of delay between warning and attack there was some discussion in committee. No “period of grace” was provided for in the French proposal (which was that ultimately adopted). “The French delegation,” says the report of the Committee, “considered that the necessities of modern war do not allow of the belligerent who wishes to take the aggressive being forced to grant any delay beyond what is absolutely indispensable to let his adversary know that force will be employed against him.” This view received the support of the majority of the Committee and was approved by the Conference. The minority (fourteen out of thirty-five) voted for a Netherlands proposal which provided for a delay of “at least twenty-four hours” between warning and attack, and in support of which Colonel Michelson, one of the Russian delegates, made a very able speech in which he pointed out that two great advantages would accrue to the world from the recognition of a necessary “period of grace.” In the first place, it would provide for a relaxation in the state of “armed peace,” for the question of peace establishments and war establishments is closely bound up with the question of a delay between warning and attack. Secondly, it would give friendly and neutral Powers an opportunity to reconcile the contending nations.

Proposal
to allow
24 hours’
“grace.”

¹ When the declaration of war is contained in an ultimatum it is not expressly required by the Convention to give the reasons, but that is merely because an ultimatum implies a demand for redress or for the satisfaction of a claim, and it was unnecessary to provide specifically for *une acclamation motivée* in such a case.

The decision of the Committee there-upon.

The verdict of the Committee upon this proposal was as follows :

The fixing of a time of grace did not appear reconcilable with actual military exigencies ; the mere fact of having admitted the necessity for a pre-notification is in itself a great advance. One may hope that the future will allow a still greater advance to be made, but it is better not to go too quickly. It is noteworthy that the Institute of International Law did not think it possible to fix a period of delay, although, in such a matter as this, an assembly of jurists would naturally be less cautious than an assembly of diplomatists, soldiers, and sailors.

As the Convention stands, hostilities may legitimately be begun the moment the notification reaches the adversary. A condition of perfect preparedness is assumed on the part of the latter : it is taken for granted that he is ready to defend himself, like a duellist waiting for the word to take guard.¹

The aggressor must make the declaration.

It is, of course, the aggressor who is bound to make the formal declaration of war. Every nation has the right to defend itself from attack. Continental jurists, while requiring a declaration from the belligerent who takes offensive action, admit that it is not required from the party repelling a hostile enterprise.² Bluntschli adds that a defensive war may necessarily have, for military reasons, to take the form of offence. "From the point of view of law, the difference between the offensive and defensive war lies, not in the fact of being the first to cross the frontiers or invade the hostile territory, but in the difference of the respective rights of the parties."³ Hence he would dispense with a declaration where the threatened belligerent forestalls his adversary in self-defence. The doctrine is a dangerous one ; aggressors are usually able to satisfy themselves that they are acting on the defensive. Bluntschli's view has no warranty in the Convention of 1907. The belligerent who strikes first, whether he is really acting on the defensive and his aggression is merely a tactical mode of self-protection, or not, is bound to give notice as laid down in the first Article.

¹ The report of the Committee is given in Blue Book *Protocols of the Eleven Plenary Meetings of the Hague Conference of 1907* (Cd. 4081, of 1908), pp. 120-3.

² Bonfils, *op. cit.*, sec. 1037.

³ Bluntschli, *Droit International Codifié*, sec. 521-4.

The notification of neutral Powers which is required by the second Article generally takes the form of a manifesto. This second Article is the result of a modification of two proposals which favoured neutrals unduly and which were held to be inconsistent with the war rights of belligerent States. The first was a Belgian proposal which said :

Notifica-
tion of
neutral
States.

The state of war must be notified to neutral Powers. This notification, which may be made by telegraph, will not produce any effect as touching neutrals until forty-eight hours after its receipt.

The French jurist, M. Louis Renault, summed up the objections to this proposition in the caustic remark that "it was inadmissible to allow neutrals 48 hours in which to violate the obligations of neutrality." The other was a British proposal which ran :

A neutral State is only bound to take measures to preserve its neutrality after it has received a notification of the commencement of hostilities from one of the belligerents.

The following is the commentary of the Committee upon the text finally adopted :

The view which has been adopted is that it is impracticable to fix any delay. The governing idea is a very simple one. A State can only be held to its duties as a neutral when it is aware of the existence of war which creates such duties. From the moment it has been informed of the outbreak of war, no matter by what means (provided there is no doubt of the fact), it cannot do anything inconsistent with neutrality.

The outbreak of war brings in its train many changes in the juristic relations of the various component units of the States concerned. First and foremost there is the great and complete change in the mutual relations of the units most concerned in war—the armed forces of the several States. From being, in one another's eyes, merely uninteresting and rather absurd foreigners talking an outlandish tongue, each suddenly becomes an element of vital importance in the other's scheme of things—an element whose sole function is to do the other element grievous bodily harm and to count the deed to itself for righteousness. But the effect of the outbreak of war is not

The out-
break of
war ter-
minates
amicable
relations
between
enemy
nationals.

confined to the combatants in each country; on the general body of citizens, if it does not mean for them such a direct and complete negation of the golden rule as it does for the armed forces, it entails many new obligations and restrictions. Amicable relations come to an immediate end. The subjects of the enemy State cease, to a large extent, to be men and brothers. One may not trade with them, or contract with them, or sue them or be sued by them, and these restrictions apply equally to neutral subjects domiciled in one of the belligerent countries. In the English Prize Court case of *The Hoop* and in the American case of *The Rapid*, it was laid down as a maxim of universal law that all commercial intercourse is forbidden between the subjects of States at war, without the licence of their respective Governments. In the former case Lord Stowell said :

Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit? . . . In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced, cannot be a state of legal intercourse.¹

In 1871, the Berlin banker, Herr Güterbock, was sentenced to imprisonment for subscribing to the French War Loan.¹ As Professor Bonfils remarks—"The continuance of commercial relations between citizens would give the situation a doubtful and equivocal character. They would contribute directly or indirectly to the enemy's means of defence, increase or renew his resources, facilitate the prolongation of the struggle and render it therefore more disastrous and less humane."² And the French jurist's remarks are echoed by M. Geffcken, who adds that to allow intercourse between the subjects of warring States would put the actions of individuals and of their rulers

¹ Boyd's *Wheaton's International Law*, sec. 309-310. In the case of *Esposito v. Bowden*, Judge Willes said: "A declaration of war imparts a prohibition of commercial intercourse with the inhabitants of the enemy's country, and such intercourse, except with the licence of the Crown is illegal." (F. E. Smith, *International Law*, p. 93.)

² Bonfils, *op. cit.*, sec. 1060.

in opposition.¹ In modern wars the general interdiction of commerce has usually been relaxed by the grant of "licences to trade" or special exemptions given in particular cases. It may suit a belligerent's interests to allow his subjects and the enemy's to carry on general trade under certain specified conditions, or trade in a certain commodity, and in such cases the high act of sovereignty by which he grants the privilege removes the taint of illegality from the subsequent commercial transactions. During the Crimean War, Great Britain permitted English subjects to trade with Russian ports which were not blockaded, provided the merchandise was not contraband of war and was carried in neutral bottoms; and Russia on her side allowed the importation of English goods.² There was mutual advantage in the freedom of trade which was thus sanctioned by the two Powers. In the American Secession War a special exemption was made in the case of trade in cotton. The people in the Cotton States were naturally eager to dispose of their produce, which made the wealth of the South and gave them the money by which they were able to carry on the war. With the outbreak of hostilities and the blockading of the tide-water towns of the South, the price of the commodity rose in the Northern States and in Europe, and the business instincts of the Washington administrators prompted them to sanction the purchase (cheaply, because of the local glut) of the cotton which the southern farmers had stored away when the markets were closed. The policy of allowing freedom of trade in cotton was certainly a good business policy, but it came very near "giving aid and comfort" to the rebellion, as Sherman pointed out in a vigorous protest.³ After he had received the order from Washington to purchase cotton for gold, he wrote to Army Headquarters (September, 1862)—"Trade in cotton is now free, but in all else I endeavour so to control it that the enemy shall receive no contraband goods, or any aid or comfort."⁴ The rule prohibiting commerce with enemy subjects is also relaxed in the case of supplies which are required by an invading army and which it finds it convenient to purchase from the local

¹ Quoted, Bonfils, *loc. cit.*

² Lawrence, *International Law*, pp. 307-8; Bonfils, *op. cit.*, sec. 1063.

³ Sherman, *Memoirs*, Vol. I, pp. 266-7.

⁴ *Ibid.* p. 275.

inhabitants.¹ Such transactions require no act of State to legalise them, the authority of an army commander being sufficient. Generally the mitigations of the broad rule of law have been based on the self-interest of belligerents and do not amount to a counter-usage permitting commerce. High authority is needed to prove that any commercial transaction with an enemy subject is not bad *in se*. The question whether, and, if so, to what extent, the rule prohibiting legal relations between enemy nationals is now affected by Article XXIII (h)—an addition made at the last Hague Conference—will be considered when I come to that article.

Aim of
this book.

It is unnecessary, in such a book as mine, to examine the effect which the outbreak of war has upon treaties previously concluded between the belligerents and upon diplomatic relations generally. These are questions of high politics, which would be dealt with by the civil administration. My aim is to follow the operations of war, from the moment of the declaration to the final peace, in the guise of one who might be called upon to advise on questions of war law; in short, to fulfil the functions which were assigned to the Japanese legal counsellors who accompanied the armies in the field in the war with Russia. I have therefore purposely confined myself to the consideration of such questions only as would probably come under the purview of such an adviser. The questions I deal with are those which might arise (they have not all arisen in any one war) and require to be answered on the spot, without reference to the home Government.²

Resident
enemy
nationals
are not in-
terfered
with.

The treatment of resident enemy nationals has undergone a great change for the better in modern times. Ancient theory and practice regarded them as enemies, individually, and admitted the right to arrest and imprison them. The last instance of this rigorous rule being put into force is Napoleon's detention of British subjects who happened to be in France when war broke out in 1803.³ Present usage allows enemy nationals to depart freely, even where they belong to the armed forces of the other belligerent. "A State," says Bonfils, "has

¹ See Article LII of the *Règlement*, *infra*, p. 381.

² As to the effect of war on treaties, see Hall, *International Law*, pp. 382-7.

³ Bonfils, *op. cit.* sec. 1052.

an incontestable right to refuse to help its enemy's recruiting . . . but, from the point of view of practical utility the measure [of detaining future recruits] is condemned. To detain subjects of the enemy who would otherwise be mustered into his army is to court reciprocal treatment, and is, besides, to undertake a close surveillance over the movements of these men, who, detained against their will, will be induced by feelings of patriotism to seek every means of harming the country which detains them."¹ "There is a usage," says Pillet, "in favour of placing no obstacle in the way of enemy nationals who are recalled to serve in their country's army."² This usage applies only to men quitting the enemy's country upon the outbreak of war. It does not hold in the case of the occupation of the hostile territory. In such a case the invader suspends the recruiting laws in force and makes it a penal offence for the inhabitants to quit the territory for the purpose of joining their national forces.³ When the war of 1870-1 broke out, France and Germany allowed freedom of departure of one another's reservists,⁴ and the same rule was followed in the Spanish-American⁵ War and in the Russo-Japanese.⁶

"Present usage," says Professor Le Fur, "does not admit of the expulsion *en masse* of enemy subjects resident in a belligerent's territory, save when the needs of defence demand such expulsion, any more than, in the converse case, it admits the retention of those who wish to return to their own country, even when they are to be incorporated in the army."⁷ The bad precedent set by the Confederate Government in 1861, when it ordered the banishment of all alien enemies,⁸ has not been followed in subsequent wars. France and Germany allowed enemy subjects to continue to reside in their respective territories during the war of 1870-1, but the former country was led by military exigencies to rescind the general privilege

They are expelled only in cases of necessity.

¹ Pillet, *Les Lois actuelles de la Guerre*, p. 80.

² Bonfils, *op. cit.* sec. 1053.

³ *Vide infra*, p. 355.

⁴ Bonfils, *op. cit.* sec. 1053.

⁵ R.D.I. July-August, 1898, p. 678.

⁶ Nagao Ariga, *La Guerre russo-japonaise* (M. Fauchille's French translation), p. 37. (M. Ariga was Legal Counsellor on the staff of Marshal Oyama in the war of 1904-5. He is now Professor of International Law at Tokio.)

⁷ R.D.I. July-August, 1898, p. 677.

⁸ Draper, *History of the American Civil War*, Vol. II, p. 110.

so far as Paris and the Department of the Seine were concerned, at the end of August, 1870. A Proclamation was then issued by General Trochu which enjoined "every person not a naturalised Frenchman and belonging to one of the countries at war with France" to depart within three days, under penalty of arrest and trial in the event of disobedience.¹

The incident is instructive as showing a usage in the making; for, though there were 35,000 in Paris alone and their expulsion was clearly justifiable as a precautionary measure of defence, the general opinion in Europe was that they were harshly treated, and a sum of 100 million francs was claimed, as part of the War Indemnity, in respect of the losses they sustained by being driven out. It shows, as Hall observed, that public opinion "was already ripe for the establishment of a distinct rule allowing such persons to remain during good behaviour."² The usage has been strengthened by the precedents set in the Russo-Turkish War of 1877-8, the Chino-Japanese War of 1894, and the Russo-Japanese War, in all of which enemy residents were suffered to remain.³ In the Græco-Turkish War of 1897, Turkey ordered the expulsion of all Greeks residing in Ottoman territory, but the execution of the order was postponed from time to time, and the war ended before the period of grace which was finally fixed had expired.⁴ A similar decree of expulsion was issued in the Transvaal and Orange Free State in the Anglo-Boer War, but, except at Johannesburg, it was not carried strictly into effect. Johannesburg, with its preponderating Uitlander population, was counted upon by the British military experts as likely to require a commando of 5,000 Boers to keep its disaffected citizens in check. Most, however, of the Uitlanders either voluntarily left the town before the outbreak of the war or were sent away under the expulsion decree; the remainder, some of whom had been left by various firms to guard their interests with the special sanction of the Government, while others had evaded the order of expulsion, were summarily

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 13; Bonfils, *op. cit.* sec. 1055; Pillet, *op. cit.* p. 80.

² Hall, *International Law*, p. 392.

³ See Pillet, *op. cit.* p. 81; Ariga, *op. cit.* p. 37.

⁴ R.D.I. July-August, 1898, p. 677; Pillet, *op. cit.* p. 82.

expelled under a new decree on April 30, 1900, after the explosion in the Begbie powder factory, which was attributed to British agency.¹ Although the complicity of the British residents in the explosion is quite unsupported by evidence, one may, on the whole, looking to the past record of Johannesburg—a hotbed of disaffection in the heart of the Boer dominions—agree with Professor Despagnet in regarding the Boer Government's action as “a measure rendered indispensable by circumstances.”² Whatever right of continuing their residence may be accorded to enemy subjects, it must be subordinate to considerations of military necessity.³

The modern usage of war forbids a belligerent to seize the property of enemy subjects which happens to be within his borders when war begins. “They have acquired it,” says Professor Pillet, “under the surety of the guarantee given to international commerce and it would be unjust to despoil them of it.”⁴ Modern wars furnish but two instances of the appropriation by a belligerent of the property of resident enemy nationals. The first is the confiscation of the property of alien enemies by the Confederate Congress in 1861. The measure brought nearly 2,000,000 dollars into the Richmond Treasury, but it is questionable if the material gain was not dearly purchased by the alienation of European sympathy caused by the act. Lord Russell summed up the general opinion on the matter in the following words:

Whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the act of the Confederate Congress in modern and more civilised times, are so rare and have been so generally condemned that it may almost be said to have become obsolete.⁵

The second instance is the “commandeering” by the Transvaal Government of gold belonging, in the main, to British shareholders. Professor Despagnet presents the act as one within the lawful sovereignty of a belligerent Power “by reason of

¹ *Times History of the Boer War*, Vol. II, p. 125; Vol. IV, pp. 149–151.
Despagnet, *La Guerre sud-africaine*, pp. 143, 225.

² Despagnet, *op. cit.* p. 224.

³ Hall, *International Law*, p. 393.

⁴ Pillet, *op. cit.* p. 82.

⁵ Hall, *International Law*, p. 439; Draper, *op. cit.* Vol. II, p. 120.

supreme necessity," but it is impossible not to see in it a simple case of confiscation of enemy property which happened to be within the seizing belligerent's borders. The only "supreme necessity" in the case was the need of funds for carrying on the war, and if such a need were held to justify the seizure, the rule exempting enemy property would be a dead letter.¹ To say that the usage of non-confiscation is not obligatory, and that therefore the Boers and the Confederates were within their strict rights in doing what they did, does not in the least amount to a justification, for it is the essence of all usage that it is not obligatory. The two instances in question stand out in glaring contrast with the general practice of belligerents in these later days. They are chiefly noteworthy as bringing into clearer relief the process by which "contract" (that powerful engine of civilisation) is driving in its wedge ever further and further and cleaving war in twain. If war was not invented by the Troglodytes, the strange people who would not keep their contracts and so perished utterly, it was at all events a thing after their own hearts. The buccaneering spirit which is evoked by war is inherently hostile to the divine right of contract and it is a notable victory for the latter to have gained even a precarious footing in war's domain. The great battle between the two remains to be fought when contract and "military necessity" meet, and some day that battle will be waged and contract will win. There are plenty of indications, dim as yet but legible to him who will read, that gradually and by difficult advances, the very commercialism which aroused Tennyson's scorn when it came forth as the antagonist of war ("This huckster put down war" . . .) will prevail in the end and drive

¹ *Times History*, Vol. III, p. 83; Despagnet, *op. cit.* p. 142. The shareholders of the mining companies came near suffering a still heavier loss about this time. Some of the Boer officials, incited, it seems, by certain of the "soldiers of fortune" who had flocked to the Transvaal, were all for blowing in the shafts of the mines and destroying the surface plants and machinery, representing a fixed capital of many millions of pounds. They were prevented from carrying out their plans by the opposition of the more enlightened Boers, and especially by the action of Louis Botha, who (I have been told by a Boer gentleman who was one of a deputation which went to represent to him the danger threatening the mines) threatened to withdraw his commandos from the field and bring them to the Rand to guard the mines unless the policy of destruction were abandoned. See *Times History*, Vol. IV, p. 151.

war out of the field. The spirit of the market place and the spirit of war cannot live together for long. It may be that romance will be lost with the passing of war, and that some of the manlier virtues will go too, and also the often valuable "idea of extra-legal justice," for which Maeterlinck has made himself the eloquent apologist in "In praise of the Sword." But no considerations of this kind will avail to stem the process which has consigned duelling to civilisation's scrap-heap, and trial by battle, vendettas, tribal and baronial war, and other picturesque embodiments of the "might is right" principle, which are quite out of place in a grey workaday world which has discarded armour and side-arms for frock-coats and umbrellas. It is not the conscious working of any humanitarian or heroic ideal that will make war impossible, but the automatic development and extension of certain forces which are now in existence, though their mighty possibilities are little foreseen. The world is coming more and more to be governed by business men, who are supplanting the aristocratic, warrior-bred class who have ruled it in the past, and business men are not likely to be blind to the prosaic truth that it is bad policy to kill people one might sell things to. This truth is bound to become a dominant in world-economy in the future. Every acknowledgment of the claims of contract in war-time, every recognition of the war right of the private citizen as against the belligerent, is a step further in the development, hardly yet begun, which will end in some system of universal peace of which it would be idle to try to sketch the precise nature and details. Very possibly the exemption of enemy property from seizure, which I have been speaking of, will be one of the earliest and most important stages which the philosophic historian of the distant future will find it necessary to note when he traces the decline and fall of war.

CHAPTER III

THE QUALIFICATIONS OF BELLIGERENTS

Conventional law of war respecting the qualifications of Belligerents
—Hague *Règlement* Articles I to III.

ARTICLE I.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions :—

1. To be commanded by a person responsible for his subordinates.
2. To have a fixed distinctive emblem recognisable at a distance.
3. To carry arms openly ; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

ARTICLE II.

The inhabitants of a territory which has not been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article I, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

ARTICLE III.

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

THE first difficulty which meets one in the study of war law is also the greatest. It is the solution of the question—who has the right to fight in a war between civilised armies? The

answer of the Hague Conference of 1899 and 1907 is given above. It is advisable to trace the steps which led up to it.

In the first place it may be taken as an axiom of modern war law that the peaceful inhabitants of an invaded country, whether they are theoretically "enemies" of the invading army or not, are in practice never treated as such.¹ Every modern war affords proof of the truth of this statement. When Prince Frederick Charles (the "Red Prince") invaded Saxony in 1866 he issued a proclamation in which he said :—

Peaceable
enemy
nationals
are not
treated
as "ene-
mies."

We are not at war with the people and country of Saxony, but only with its Government, which by its inveterate hostility has forced us to take up arms.²

In a similar strain ran the Proclamation issued at Saarbruck by the King of Prussia on 11th August, 1870 :—

I make war against French soldiers, not against French citizens. The latter consequently will continue to enjoy security for their persons and property so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my protection.³

¹ See Hall, *International Law*, pp. 67-74. He rejects the doctrine, which originated with Rousseau, that "war is not a relation of man to man, but of State to State." There is a great weight of authority against this view. See Bonfils, *op. cit.* sec. 1047. See also Sherman's *Memoirs*, p. 226, where he says in a letter to General Halleck, dated 24th December, 1864, "This war differs from European wars in this particular; we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organised armies." Mr. H. G. Wells, in *Anticipations*, p. 186, puts the principle of differentiation which I refer to in a very graphic way: "A large part of existing International Law involves a curious implication, a distinction between the belligerent Government and its accredited agents in warfare and the general body of its subjects. There is a disposition to treat the belligerent Government, in spite of the democratic status of many States, as not fully representing its people, to establish a sort of world-wide citizenship in the common mass outside the official and military class. Protection of the non-combatant and his property comes at last—in theory at least—within a measurable distance of notice boards: 'combatants are requested to keep off the grass.'" The Preamble to the Declaration of St. Petersburg, in laying down that "the only legitimate object" of war is "to weaken the military forces of the enemy," has, in effect, given an authoritative International approval to the view that the inhabitants of belligerent States are not, in practice, regarded as enemies of each other or the hostile forces.

² Hozier, *Seven Weeks' War*, p. 126.

³ Cassell's *History of the War between France and Germany*, Vol. I, p. 41; Moritz Busch, *Bismarck in the Franco-German War*, Vol. II, p. 139.

Lee's General Order No. 73, dated Chambersburg, Pennsylvania, June 27, 1863, reminded the Confederate soldiers that "the duties exacted of us by civilisation and Christianity are not less obligatory in the country of the enemy than in our own. . . . It must be remembered that we make war only on armed men."¹

On entering West Virginia in May, 1861, McLellan said in an address to his men:—

I place under the safeguard of your honour the persons and property of the Virginians. I know you will respect their feelings and their rights.²

Lord Roberts' Proclamation of 31st May, 1900, guaranteed to the Transvaal non-combatant population "personal safety and freedom from molestation," on condition that they abstained from wanton damage to property.³

General Buller's Proclamation, on entering the Transvaal, began as follows:—

The troops of Queen Victoria are now passing through the Transvaal. Her Majesty does not make war on individuals, but is, on the contrary, anxious to spare them as far as possible the horrors of war.

The quarrel England has is with the Government, not with the people, of the Transvaal. Provided they remain neutral, no attempt will be made to interfere with persons living near the line of march; every possible protection will be given them, and any of their property that it may be necessary to take will be paid for.⁴

Marshal Oyama instructed his troops at the commencement of the Chino-Japanese war of 1895 that "the armed forces are alone to be regarded as the enemy, not individuals."⁵

The Japanese Proclamation to the inhabitants of the island of Saghalien, which was the only Russian territory invaded in the war of 1904-5, contained these words:—

To-day the Japanese army lands in this island. Its enemy is the Russian army. As for the inhabitants who show no hostile

¹ General J. B. Gordon, *Reminiscences of the Civil War*, p. 307.

² G. B. McClellan, *McClellan's Own Story*, pp. 51-2.

³ White Paper, *Proclamations issued by F.-M. Lord Roberts in South Africa* (Cd. 426, 1900), p. 7.

⁴ White Paper, *Proclamations issued by F.-M. Lord Roberts in South Africa* (Cd. 426, 1900), p. 7.

⁵ Bonfils, *op. cit.* sec. 1048, note.

sentiment, not only will no harm befall them, but, on the contrary, they will be protected in person and property and allowed the free exercise of their religion.¹

The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable. One must read the history of ancient wars, or savage wars of modern times—such as Chaka's campaigns, by which he made the Zulu name terrible throughout northern Natal—to appreciate the immense gain to the world from the distinction between combatants and non-combatants. But if populations have a war right as against armies, armies have as strict a war right as against them. They must not meddle with fighting. The citizen must be a citizen and not a soldier. Wellington told the inhabitants of southern France in 1814 that he would not allow them to play with impunity the part of peaceful citizens and of soldiers, and bade them go join the ranks of the French armies if they wished to fight.² It may be said broadly that there is no room in modern war for the resistance of unorganised inhabitants. They have had their chance of joining the armed forces of their country, and if they have not done so, then they must loyally play their part as citizens. For a while their duty to their country must remain in abeyance; with the invader comes the reign of war law, and war law has a short shrift for the non-combatant who violates its principles by taking up arms. "The civilian who kills without being bound to do so, and thereby wipes out the line of demarcation (between soldier and inhabitant), cannot be disarmed except by death. The condition of a prisoner of war does not exist for him: he must be annihilated in the interests of humanity."³ Though the sparing of a peaceful population

Demarca-
tion
between
soldiers
and
citizens.

¹ Ariga, *op. cit.* p. 17.

² See an admirable paper, *On the Relations between an Invading Army and the Inhabitants*, etc. by H. R. Droop, in the Papers of the Juridical Society, Vol. III, pp. 712-3. See also the Proclamation of 1st April, 1814, quoted by Sir E. Creasy, *First Platform of International Law*, p. 480.

³ Moritz Busch, *op. cit.*, Vol. II, p. 207. Professor Holland remarks (*Studies in International Law*, p. 73) that there are two reasons for not allowing the population of an invaded country to take part in the war: (1) guerilla warfare has an inevitable tendency to develop into cruelty; (2) if a military

is a fairly modern growth in war usage, the refusal of combatant rights to non-military people is almost as old as history: it is mentioned in the *De Officiis*.¹ The idea may be traced from the existence of a peculiar warrior caste in ancient times, through feudalism, with its men-at-arms, jealous of encroachment on their specialised pursuit, to the modern principle of the division of labour, developing a trade-unionism in fighting which would exclude all but professional or semi-professional forces from interference in war. "It is manifest," says Kipling's Umr Singh, Sikh of the Khalsa, trooper of the Gurgaon Rissala, type and spokesman of a breed of fighters, "it is manifest that he who fights should be hung if he fights with a gun in one hand and a *purwana* [a permit given to non-combatants for their protection] in the other." There is a whole chapter of war law—its history and its principle—epitomised in his words. To-day the refusal of belligerent rights to unorganised populations has a justification which it lacked in ancient times and those who claim for every citizen the right to take arms at his pleasure against an invader, are really striking at the roots of all clean and civilised war.

The affair
of
Bazeilles.

The name of the little French town of Bazeilles, south of Sedan on the road to Montmédy, will always be associated with the war law regarding resistance by unorganised populations. There has been much discussion and, no doubt, much false witness as to what happened there on the 1st September, 1870. The German official History of the War states that the inhabitants took an active part in the struggle which raged in and about the village, and that they spared neither the wounded nor the stretcher-bearers, so that "the Bavarians found themselves eventually compelled to cut down all inhabitants found with arms in their hands."² Whether, as the Germans alleged, the inhabitants burnt the helpless Bavarian wounded alive, pouring hot oil over them before carrying them into the blazing houses, which had been lighted by the German shells; or whether the Bavarians bayoneted old men and women in their beds and threw infants into the burning commander protects the inhabitants he must be assured that they do not cut off his stragglers or fire on his detachments.

¹ See Boyd's *Wheaton, International Law* (2nd edition), p. 428.

² German official *History* (English translation), Part I, Vol. II, p. 316.

houses;¹ there can be no doubt of the accuracy of two statements, namely, that the village folk resisted the Bavarians arms in hand, and that the Bavarians exacted a heavy vengeance in consequence. The town was made fuel of fire—reduced to the condition of Pompeii, says Sir Harry Hozier—and the bodies of the dead were left to burn where they lay. General Phil Sheridan saw the black ruins and smelt the odour of the burning flesh next day.² The *Daily News* correspondent relates that he saw “the charred corpses of the women and the tender little ones—a sight I dream of to this day, and wake in a cold sweat of horror.”³ To point the moral and make it clear that the destruction was not merely the unconsidered act of a maddened soldiery, a German Proclamation of the 29th September spoke of “the sentence executed against the village *in virtue of the law of war*.”⁴ It is not too much to say that the incident sent a thrill of horror through Europe. But extreme as the punishment was, the inhabitants had undoubtedly broken the law of war in joining in the street fight, and the Bavarians had a clear war right to deal summarily with those taken red-handed in action. Ten years before, a well-informed writer in *Blackwood's Magazine*⁵ pointed out that attacks by the inhabitants of an invaded country directed against the hostile troops would recoil with terrible effect upon their own heads. “Men, women and children sacrificed, the innocent as well as the guilty, houses burned and property plundered and devastated—are all considered legitimate retribution for acts of aggression by an unorganised population.” When one of Sheridan's officers was murdered, in October, 1864, with the connivance of the inhabitants of the Shenandoah Valley, an invaded territory, he gave orders for all houses within an area of five miles to be burned.⁶ In the

Punishment of inhabitants for using arms in modern wars.

¹ See Hozier, *Franco-Prussian War*, Vol. I, pp. 429–31; Cassell's *History*, Vol. I, pp. 95–8, 154; Vol. II, pp. 561–2; Busch's *Bismarck*, Vol. I, pp. 168–70.

² Sheridan's *Personal Memoirs*, Vol. II, pp. 411–12. Bismarck spoke to him of “those burning Frenchmen—ugh!”

³ *Daily News War Correspondence*, p. 190.

⁴ Cassell's *History*, Vol. I, p. 154.

⁵ Vol. 88, p. 612 (1860).

⁶ Sheridan's *Memoirs*, Vol. II, pp. 50–2. When a few houses had been burnt, Sheridan ordered the devastating work to be stopped, but he carried away all the able-bodied males as prisoners.

Russo-Turkish War of 1877, when the Russians captured Eski-Zagra in Thessaly, shots were fired upon them from certain houses. General Gourko ordered the inhabitants of such houses to be hanged at their doors.¹ In the same war the headman of the village of Gusova was executed because the inhabitants took part in an action.² In the South African War, all houses from which shots were fired were destroyed by the English troops.³ The Parliamentary Paper, "Return of Buildings burnt in each month from June, 1900, to January, 1901,"⁴ shows that about forty-five houses in the Orange Free State and 120 in the Transvaal were destroyed during this period because the British troops were "sniped" therefrom.⁵ History affords ample evidence of the universality of an invader's war right to punish popular resistance with a heavy hand. The lesson which the Bavarians wrote in blood and fire at Bazeilles was unique only because of its dramatic and terrible completeness.

Great difficulty of granting combatant status to populations in arms.

An invader, then, has a clear war right to refuse belligerent privileges to the ordinary inhabitants of the country through which he passes. Has he a similar right as against a population which has risen in arms before his arrival, and, if he has not, can he impose conditions on such a population before he acknowledges their status as combatants? The Hague *Règlement*, which is silent as to popular resistance of the kind which I have been discussing, grants belligerent privileges under certain conditions in such a case as that last mentioned. The whole question was discussed at great length at Brussels; the Conference was indeed wrecked on the rock of this very difficulty. The fact is that on this question there are clashing interests which make a solution enormously difficult. The great Powers who have adopted universal service would confine belligerent rights to properly organised armies, whether

¹ Colonel Epauhin, *Operations of General Gourko's Advance Guard in 1877* (Havelock's translation, 1900), p. 160.

² Count Von Pfiel's *Experiences of a Prussian Officer in the Russian Service, 1877-8* (Colonel Bowdler's translation), pp. 180-1.

³ Baty, *op. cit.* p. 87.

⁴ White Paper, Cd. 524.

⁵ I am leaving out of account houses destroyed for "harbouring Boers" or for being "used as a stronghold." The numbers given are those of the cases in which firing on our troops is expressly mentioned as the reason for destruction.

standing in peace time, or supplemented by reservists on mobilisation. The nations who have not established conscription regard such a view as fatal to the cause of national defence. The Hague solution is a compromise, which Germany, despite its pledges in the Convention, will not even now accept as a correct statement of the International Law on the point.¹ Before I come to the Brussels discussion, I shall try to show, as briefly as possible, the historical events which gave the question its great interest for the delegates. The events I refer to are those connected with the French *Francs-tireurs* of 1870. They are still instructive, though the matter has lost most of its importance for the great European nations who embody in their territorial reserve all able-bodied citizens of fighting age not included in the rolls of the army, army reserve, or organised national guard. A study of them enables one to understand how civil populations, rising in what is termed a *levée en masse*, have come to be admitted under certain conditions to belligerent privileges, in the teeth of the opposition of the great military Powers. In France, the *Franc-tireur* is dead, but the question which he begot is still alive and of vital importance for England, America, and other nations.

The *levée en masse*, or resistance by unorganised populations in large bodies, is as old as history, but its previous incarnations may be disregarded, for it was born anew in modern times on the 2nd September, 1870. On that day MacMahon's troops, disheartened by the hopeless succession of marches and counter-marches of the preceding weeks, baffled in every attempt to break through the ring of steel and fire which crept through the woods to encircle them in Sedan, hopelessly beaten in every department of warfare except personal courage, paid the price of their rulers' ineptitude and criminal folly, and surrendered to the Prussian King or passed into Belgium to be disarmed, to the number of nearly 100,000. At a blow an army was wiped off the French army-list. Another army, Bazain's—nearly twice as strong—was already shut up in Metz and lost to the French cause. France had armies still, but her right hand was crippled at Metz and Sedan. It was the loss of these two armies which led to the formation, throughout the country, of

The birth of the modern question of the *levée en masse*.

¹ *Vide supra*, p. 7.

National
Guards
of the
Second
Levy.

the famous bodies of the *Francs-tireurs* and National Guards of the Second Levy. Even without the two great initial disasters of the war, such bodies would have sprung up in all probability, but it was the necessity for a great national effort to stem the advance of the German hordes which produced the universal uprising of citizen-armies of this kind. As to the National Guards of the Second Levy, who were the less important body of the two, they may be dismissed in a few words. They were men of under forty, who had bought freedom from service in the regular army, and were not sufficiently efficient to be formed into the battalions of the First Levy. They wore no uniform and kept their arms (which were supplied by the State) concealed in woods and thickets, whence they assumed them to lie in ambush for the Germans.¹ I shall give just one example of how they were treated by the invaders. When Gisors was captured in October, 1870, after being defended by the National Guards of the Second Levy, the Prussians refused to treat the latter as prisoners of war and shot five whom they had captured.² Generally speaking, what I may say about the *Francs-tireurs* may be held to apply equally to the less numerous and less important body also.

Francs-
tireurs.

As to the *Francs-tireurs*, they were of two kinds. Some were authorised by Government and wore uniforms—for instance, the companies of volunteer Engineers, to operate on the German communications,³ and the mysterious company of the *Gers*, consisting of 50 picked men, in a black uniform, with skull and cross-bone facings, who never spoke;⁴ others fought entirely on their own initiative and for the most part were distinguishable from the French peasants only by a badge which was invisible at a distance and easily removable.⁵ The distinction between the two kinds of *Francs-tireurs* has often been overlooked by those who have written to the question of their legitimacy.

Severity
of the
German
treat-
ment.

It cannot be seriously questioned that those *Francs-tireurs* who made themselves indistinguishable from the peaceable

¹ *The Franco-German War, 1870-1, by Generals and Other Officers who took part in it.* Translated and edited by General Sir J. F. Maurice (1900), p. 546.

² Cassell's *History*, Vol. I, p. 393.

³ Hozier, *Franco-Prussian War*, Vol. II, p. 90.

⁴ Hozier, *op. cit.*, Vol. II, p. 149.

⁵ Droop, *op. cit.* p. 705.

population either by removing their distinctive badge, or, as some did, by changing into civilian garb after committing acts of aggression,¹ were not entitled to belligerent rights. No army commander will suffer his troops to be menaced by men who claim now the privileges of combatants now those of the peaceful inhabitants. But the Germans, judging all the *Francs-tireurs* by the offenders, adopted an unduly severe attitude towards such bodies generally. They declared by Proclamation that they would regard as soldiers only those who (1) wore a uniform with irremovable marks and recognisable at gun-shot distance, and (2) carried papers showing that they formed part of the French army.² All persons who fought without fulfilling the above conditions were liable to ten years' imprisonment, or, in aggravated cases, to death: and every case in which a *Franc-tireur* shot a soldier was regarded as an "aggravated" one.³ The terms of the Proclamation were no idle threat. "A great number of *Francs-tireurs* were shot after capture, and the towns and villages suspected of complicity with them were fined millions of francs."⁴ At Ablis, between Paris and Tours, the inhabitants and a band of *Francs-tireurs* attacked some German troops who were quartered there; for

¹ See Schiebert, *Franco-German War* (Ferrier's translation), p. 155; Maurice, *Franco-German War*, p. 546; Busch, *Bismarck*, Vol. I, p. 196; Cassell's *History*, Vol. II, p. 180 ("In the knapsack of each *Franc-tireur* was found a complete suit of plain clothes"); German Official *History*, Pt. II, Vol. I, p. 14. Even regular soldiers have been known to change into civilian garb to escape the fate of belligerents. The Greek soldiers who were in Volo when it was occupied by the Turks in 1897 changed their uniforms for civil dress; but then Greek soldiers, like a certain Minor Prophet, are "capable of anything." (See Bigham, *With the Turkish Army in Thessaly*, p. 89.)

² H. Sutherland Edwards, *The Germans in France*, p. 152. The following Proclamation was posted outside Metz: "The Commandant-in-Chief of the 2nd German Army again makes it known that each individual who does not belong to the regular French army or Garde Mobile found bearing arms, under the name of *Franc-tireur* or other designation, will be considered as a traitor and hanged or shot at the place where he is taken without further consideration."—G. T. Robinson, *The Betrayal of Metz* (1874), p. 231.

³ Edwards, *op. cit.* p. 152.

⁴ De Martens, p. 373. He adds that one German officer who had to carry out the execution of twenty-five *Francs-tireurs* was so overcome by his gruesome task that he expired immediately after performing his duty. In some cases the *Francs-tireurs* were punished by hanging. Cassell's *History*, Vol. I, p. 220; Vol. II, p. 48.

this the town, and also a neighbouring village from which the Franes-tireurs had come, were burnt to the ground next day. This was but one of numberless instances.¹ A fine of a million francs was imposed on any Department in which Franes-tireurs were encountered.² The uniformed and authorised Franes-tireurs were subjected to the same stern rules as their blouse-clad, unauthorised fellows. Twenty-two men of the company of the Gers were captured and ordered to be shot, but their gallant bearing when paraded for execution raised the enemy's admiration and they were spared—a tribute to their personal courage, not an acknowledgment of their rights as combatants.³

Con-
ditions
imposed
by the
Germans.

The independent, roving warfare which the Franes-tireurs waged was doubly harmful to the Germans. In the first place, it endangered the lines of communications on which the huge invading armies depended for their ammunition and supplies. In the second, it hampered the Uhlan scouts. The latter were the eyes and ears of the German armies; riding ahead of the main columns in small bodies, they felt the way for the slowly advancing masses behind and also created a valuable moral effect on the country by making the invaders appear ubiquitous. Many a district far from the path of the German columns was awed into quietude by the daring confidence of a few of these arrogant horsemen. The Franes-tireurs played an important part in checking the raids of these "tentacular" Uhlans. When every tree and thicket might conceal a watchful free-shooter, waiting with finger on trigger, the duty of the German scouts became one of great danger and difficulty.⁴ The very severity with which the Franes-tireurs were treated is a tribute to their effectiveness as fighters. One of the two conditions which the German authorities imposed on them, the first, that they should be distinguishable from the ordinary population, is clearly a reasonable one.⁵ The other, which required an individual authorisation (*appel*) in each case, is more doubtful. In the Secession War, Sherman, whose views on every subject

One
reason-
able.

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 77.

² Hozier, *op. cit.* Vol. II, p. 78.

³ Cassell's *History*, Vol. I, p. 525.

⁴ *Ibid.* p. 525.

⁵ As to the requirement that the distinctive badge should be recognisable at gun-shot range, see *infra*, p. 57.

of this nature are sane and illuminating, made it a condition precedent to the grant of combatant privileges to bodies of this kind, that "if detached from a main body, they must be of sufficient strength, with written orders from some army commander, to do some military thing."¹ In other words, Sherman insisted upon an order being carried by the leader. This requirement is only a reasonable precaution against banditism. But to ask, as the Germans did, for an individual authorisation for each member of a body whose chief can produce a written order from an army commander, and who are both distinctively dressed and known to act under a general authorisation of the hostile Government, is to go beyond reasonable requirements. "It is doubtful," says a German jurist, "if such a demand can be insisted upon. Some authority from the commanders under whom these troops act, some uniform, and the observation of the laws of war, that is all that is necessary, but sufficient to entitle them to soldiers' rights."² The Russian jurist, Professor de Martens, remarks as regards the treatment meted out to the *Francs-tireurs* that "the public opinion of the neutral States of Europe has found this conduct of the German military authorities too cruel."³

The other
not so.

If the German methods were severe, they were at least effectual. The flying columns which brought sudden retribution by sword and fire for any assistance given to that *caput lupinum*, the free-fighter, and even for failure to warn the invaders of the presence of bodies of *Francs-tireurs*, bred terror throughout the country districts of France. The people were cowed into refusing their countrymen food and shelter. "In self-defence," wrote the Tours correspondent of the *Daily News* at the time, "the *Francs-tireurs* are obliged to put illegal pressure on those people whose patriotism is entirely regulated by a care of their pockets. If they did not, what with the disorganisation of the military commissariat and finance

Thesevere
treatment
militarily
justified.

¹ Bowman and Irwin, *Sherman and His Campaign* (New York, 1865), p. 234.

² Geffcken sur Heffter, quoted Bonfils, *op. cit.* sec. 1091.

³ *La Paix et la Guerre*, p. 374. On the *Francs-tireurs* generally, see Hall, *International Law*, pp. 522-3. The German requirement in the matter has been condemned by a majority of the members of the Institute of International Law, at the Hague session of 1875 (Hall, *op. cit.* p. 520, note).

departments, they would be left to die of fatigue and hunger.”¹ And Mr. Sutherland Edwards says: “Towards the close of the war, food and drink were often refused them [the *Francs-tireurs*], the peasants having learned to look upon them as dangerous guests, whose visits, if the Prussians suddenly arrived, meant destruction for the houses in which they were being entertained.”² Recruiting for the irregular corps was stopped. When the greatest of irregular fighters, Garibaldi, stricken with years and hardship, borne in a carriage (for he was too ill to ride), came to bring his sword and his unrivalled knowledge of guerilla warfare to the service of the Republic, he found a universal apathy in south-eastern France which no appeal to patriotism could dispel. He and his red-coats came in vain. The people cheered them, but their sympathy stopped at cheering. What happened at Beaune is typical of the general terror which the fear of German reprisals had inspired. One of Garibaldi’s lieutenants, Colonel Teinturier, was sent to put Beaune in a state of defence, as could easily have been done, but the inhabitants begged him to abandon the town and leave them to their fate. The schooling of the Prussians’ flying columns had killed even patriotism.³

In siege operations the rule of war is relaxed.

Before I come to the Brussels Conference, I must mention one case in which the strict war right regarding resistance by non-military citizens is waived under a general usage. This is the case of a regular siege or bombardment of a fortified town. A commander who has forced a garrison to capitulate, does not usually punish the inhabitants for joining in the defence, though he is not bound by any Convention to show such leniency. Indeed, as will appear later,⁴ the civil inhabitants of a beleaguered town are now given certain privileges, such as notification of a bombardment (except in a surprise attack), and in some cases permission to leave the fortress; and it is also usual for humane commanders to avoid deliberately shelling the residential parts of a bombarded town.⁵ In return for these

¹ Cassell’s *History*, Vol. I, p. 365.

² Edwards, *op. cit.* p. 278. See also Cassell’s *History*, Vol. I, p. 221.

³ Cassell’s *History*, Vol. I, p. 486.

⁴ *Vide infra*, p. 171.

⁵ The first privilege is founded on Convention (Hague, Article 26), the other two are merely usage which has not become so general as to be universally binding.

special privileges, the inhabitants ought in equity to abstain from taking part in the defence. But many another siege besides that of Saragossa has been prolonged through the mingling of citizens with soldiers in the trenches or on the bastions, and a magnanimous victor is usually disposed to let the general surrender serve as an act of indemnity and oblivion for such irregular resistance.¹ It was so at the last siege of Port Arthur. Professor Ariga says, "We captured many workmen who participated in the defence of the forts and we did not shoot them."² At Kars the white-turbaned townsmen helped the Turkish Troops under Colonel Williams, the English commandant, and in the repulse of the great Russian assault of 29th September, 1855, 101 of these townspeople fell in battle. But when Williams capitulated to Mouravieff, the latter granted full protection to all the inhabitants without exception.³ In Osman Pasha's heroic defence of Plevna in 1877, the inhabitants of the town and district were armed and fought in the trenches without incurring any punishment from the Russian commander after Osman's capitulation.⁴

It is instructive to compare the Hague rules as to the qualification of belligerents with the original Russian project for the Brussels Conference. The latter was as follows:—

The
Brussels
proposal
as to
belliger-
ent quali-
fication.

(a) The rights of belligerents shall not only be enjoyed by the army, but also by the militia and volunteers in the following cases: 1. If, having at their head a person responsible for his subordinates, they are at the same time subject to orders from headquarters; 2. If they wear some distinctive badge, recognisable at a distance; 3. If they carry arms openly; and 4. If, in their operations they conform to the laws, customs, and procedure of war. Armed bands not complying with the above-mentioned conditions shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in case of capture shall be proceeded against judicially.

(b) The armed forces of belligerent States are composed of combatants and non-combatants. The first take an active and

¹ J. S. Risley, *The Law of War* (1897), p. 117, holds that "the inhabitants of fortified towns are so closely associated with the garrison that they are considered to have lost their non-combatant character."

² Ariga, *op. cit.* p. 90.

³ Nolan, *War Against Russia*, Vol. II, pp. 524, 532.

⁴ Von Pfeil's *Experiences*, p. 64.

direct part in warlike operations ; the second, though forming part of the army, belong to different branches of the military organisation ; such are those ministering to religious wants, the medical and control departments, the administration of justice, or those who may be attached to the army. In case of capture by the enemy, non-combatants shall enjoy equally with the first, the rights of prisoners of war ; doctors, the auxiliary personnel of the ambulances, and clergymen enjoy, moreover, the rights of neutrality.

(c) The inhabitants of a district not already occupied by the enemy, who shall take up arms in the defence of their country, ought to be regarded as belligerents, and if captured should be considered as prisoners of war.

(d) Individuals belonging to the populations of a country in which the enemy's power is already established, who shall rise in arms against them, may be handed over to justice, and are not regarded as prisoners of war.

(e) Individuals who at one time take part independently in the operations of war, and at another return to their pacific occupations, not fulfilling generally the conditions of paragraphs (a) and (b), do not enjoy the rights of belligerents, and are amenable, in case of capture, to military justice.¹

The famous debate at Brussels, 1874.

The foregoing five Articles are now, in consequence of modifications and suppressions, represented by Articles I, II, and III of the Hague *Règlement*.

The delegates at Brussels were divided into two camps—one representing the interests of great armies, the other those of England, Spain, and the lesser European States. I shall give the main arguments on each side in the very words used at the Conference. The first extract is a quotation from *War in its Relations to International Law*, by M. Rolin-Jacquemyns, and was adopted by the President, Baron Jomini, in terms as expressing his opinion exactly. The other extracts are from the speeches of the German and Russian delegates.

(1) The views of the "compulsory-service" Powers.

"What is to be desired is that in future free populations should have sufficient firmness and forethought to acquire a strong military organisation, based upon the equal participation of all in the defence of their country. This is for them, not only a national, but a humane duty ; for the more the war is conducted on both sides by regular and disciplined troops, the less will humanity suffer. There is no doubt room for the most noble

¹ For (a) and (b), see Brussels B. B. p. 162 ; for (c), (d), and (e), do. p. 172.

feeling and the most heroic conduct elsewhere than under a uniform, and it must be admitted that amongst those unfortunate peasants who were shot in virtue of the laws of war, many were guilty of nothing more than having obeyed an instinctive and almost irresistible sentiment of local patriotism. It must, however, be admitted, on the other hand, that this kind of resistance, which is, moreover, by no means efficacious when opposed to foreign invasion, must inevitably lead on the one side to marauding ("*banditisme*") and its worst excesses, and on the other to severe repression.¹ . . .

The following are the respective rights, duties, and interests of the attacking State and of the State attacked in connection with a "*levée en masse*." The party attacked has the incontestable right of defence without any restriction whatever. This is a sacred right which our Government has never had any idea of restraining in any manner whatsoever. . . . But co-existing with this right, is the duty of the party attacked to act in conformity with the laws and usages of war, so as to prevent the struggle becoming savage and barbarous. I will add that the real interest of the party attacked demands that his defence should be organised, as much for the sake of internal security, as to render his own defence effective, and also with the view of being able to require the aggressor himself to act in conformity with the laws and usages of war. The duty of the aggressor is to respect national defence as long as that defence is in conformity with the laws of war, and it is his interest that such defence be regulated in order that he may avoid having recourse to severe measures, which the violation of the laws and usages of war would inevitably compel him to take. If, however, the defenders fail in their duty, the aggressor acquires from this very fact the right to release himself from observing the laws and customs of war in such proportion as is required for his own safety.² . . . In principle it has been unanimously laid down and recognised by all the members of the Committee that the patriotic feeling which impels all the able-bodied men of a nation to take up arms in defence of the national territory if invaded, is not only an imprescriptible right, but also a sacred duty. On the other hand, it has been admitted that if this patriotic enthusiasm were left to itself, without direction, without organisation, without rules, without precautions, it would cause very serious inconvenience, as much from the point of view of the public security of the country itself, as from that

¹ Brussels B. B. p. 249.

² *Ibid.* p. 309. See in this connection De Martens, p. 381, who points out that "the history of the Paris Commune ought to remind every nation for all time of this fact, that it is easier to distribute arms than to recover them."

of the efficiency of the defence, and of the character of extreme violence which a struggle under such conditions would inevitably assume.¹ . . . Unorganised forces, without a superior commanding officer, without direction, without rules, led on only by a patriotic impulse, could not observe the laws and customs of war of which they are ignorant.² . . . There are two kinds of patriotism, that which acts under regulation and that which does not. Which is preferable for defence? Evidently that which acts under regulation.³ . . . Both a *levée en masse* and a *levée* in a district must be organised in the same manner as laid down in Article (a) [I of Hague] for the case of other combatants.⁴

(2) The
views of
the
secondary
Powers.

The opposite view found its chief supporters in the representatives of Spain, Belgium, Holland, and Switzerland—the last three being, curiously enough, perhaps the only European countries in which there has been no instance of a *levée en masse* during the Christian era.⁵ I shall give extracts from the speeches made by these delegates also.

When every nation has organised its forces for a regular war, when on all sides men are ready to march at the sound of the first cannon shot, numerical force will never be on the side of the secondary States. It is therefore in their interest especially that it is necessary to preserve intact that powerful lever called patriotism, that feeling which makes heroes, and to which all the States here represented owe those pages of their history of which they are most proud.⁶ . . . Baron Lambertmont would contemplate with regret the chances of its being said that the Conference has been more careful with regard to the material than with regard to the moral side of the question; that it was too exclusively occupied with the means of insuring the tranquillity or the security of populations who would be led to look upon the proposed Convention as only an insurance contract against the evils of war. As it has already several times been pointed out by the delegate of Belgium, and as it was only yesterday stated by the President, the defence of a country is not only the right, but also the duty of a population. Events take place during war which will continue to take place, and which must be accepted. But the question before them is that of converting them into laws, into positive and International rules. If citizens are to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which

¹ Brussels B. B. p. 257.

² *Ibid.* p. 265.

³ *Ibid.* p. 254.

⁴ *Ibid.* p. 263.

⁵ De Martens, p. 377 (from Brialmont's *L'Angleterre et les petits États*).

⁶ Brussels B. B. p. 255.

they are about to be shot the Article of a Treaty signed by their own Government which had in advance condemned them to death. These are facts which it would be better not to regulate, if they be not agreed as to the tenor of a provision regulating the right of taking up arms in an occupied territory.¹ . . . The Russian proposal would amount to a decree of moral disarmament proclaimed in advance.

The attitude of the smaller Powers towards the question of the belligerent disqualification of the inhabitants of an occupied territory is well expressed in a remark made by the Netherlands delegate at the first Hague Conference. "Our country," he said, "is of such small extent that it might be surprised and occupied almost entirely in two days, our army being hurled back on Antwerp and unable to resist. Could we, in view of such a serious situation, relieve our citizens in any way of their duty to their country, by seeming (at least) to dissuade them from contributing to the resistance?"²

The result of the discussion was that the final sentence of the proposed Article (a), and the proposed Articles (d) and (e) were suppressed.

The French delegate raised another point, that of a man defending his house against the plunderers and stragglers of an army. "This man's defence is legitimate, he could not be treated as a non-belligerent." He proposed the following text to meet the point :—

Proposal regarding self-defence of inhabitants.

Every individual captured bearing arms in defence of his country, and who has acted in conformity with the laws and customs of war, shall be considered as a belligerent, and be treated as a prisoner of war.³

No agreement could be reached on this point. The Belgian delegate pointed out that "if individuals are not mentioned in any clause, it must not be argued *a contrario* that they are beyond the pale of the law; the special case of individuals acting separately in a non-occupied country, will remain, with many others, in the unwritten law,"⁴ and summing up the results of the whole discussion on belligerent qualifications, he

¹ Brussels B. B. p. 264.

² Hague I B. B. p. 55.

³ Brussels B. B. p. 265.

⁴ *Ibid.* p. 265.

Two important questions left undecided.

remarked that two cases had not been legislated for and were left to the unwritten law of nations :—

(1) The case of a citizen, who, acting singly and in an *unoccupied* part of the country, should commit hostile acts, intended, for instance, to impede the advance of the enemy.

(2) The case of a population taking up arms to resist a hostile army in an *occupied* territory.¹

(1) That of the resistance of individuals in unoccupied territories.

As to the first of these two cases, it is very doubtful if combatant rights would be granted to an individual inhabitant of an unoccupied country who bore arms against an invading army: as, for instance, *Mr. Brown* in *An Englishman's Home*.² "It is for *massed action*, not for individual action, that the Hague Conference has secured belligerent privileges in such cases. As a French jurist observes, for a *levée en masse* in an unoccupied territory, "the character of belligerents results from the resistance of a respectable number."³ Sherman required proof from irregulars that they were authorised combatants⁴ and the Germans insisted still more strongly on this point in the case of the French *Francs-tireurs*. So far as organised bodies of troops are concerned, the latter power has now receded from its position of 1870–1, but it still insists on the necessity for such proof in the case of individuals: witness the following extract from the official manual :—

From the military point of view, there is no great objection to waiving the demand for an authority from the Government, when it is a question of organised units; but, where *individual* enemies are concerned, it is impossible to forgo the requirement of some proof that they belong to an organised body, to entitle them to treatment as belligerents and not as bandits.⁵

One finds the same view emerging in the South African War. The British authorities refused to treat *snipers*, or individuals who carried on hostilities without belonging to any commando, as proper combatants. They ordered them either to desist from sniping or to go regularly on commando, and burnt their farms down if they disobeyed, or, when they could catch them, imprisoned or deported them.⁶ One can hardly question a com-

¹ Brussels B. B. p. 294.

² *Vide supra*, p. 16.

³ Bonfils, *op. cit.* sec. 1097.

⁴ „ „ p. 45.

⁵ *Kriegsbrauch im Landkriege*, p. 6.

⁶ „ *infra*, p. 62.

mander's right to treat such individual fighters as illegitimate combatants, in the absence of proof to the contrary. No invader will suffer the "peaceable" inhabitant to indulge in some amateur hedgerow fighting in his spare moments, and while it would be unreasonable to require a massed *levée*, never to disintegrate and to forbid its leader ever to detach one or two men for a special service—to blow up a bridge, perhaps, or to carry despatches, or to signal to other bodies—military exigencies appear to justify the requirement of some proof that such individuals are not inhabitants meddling improperly with hostilities. The question of qualification would ordinarily arise only on the capture of the suspected persons, and if they could produce some authority, duly attested, showing that they belonged to a *levée en masse*, which *levée* was recognised by the capturing belligerent, the latter could hardly refuse them combatant rights without rendering his recognition of the *levée* they belong to illusory.

The second case is more open to doubt as to the manner in which any separate Government would regard it. From what has been said in the earlier part of the present chapter, it follows that the claim of an unrestricted right of resistance on the part of the ordinary inhabitants of an occupied country cannot be admitted unless the separation of combatants and non-combatants is to be abandoned; and it is greatly to the advantage of the world at large that this separation should be maintained. Inhabitants who rise in an occupied territory have no rights under international agreement. Conventional war law deals with them, as it deals with spies, on the broad principle (a principle not unknown to humanity in other spheres of action) that he who tries *and fails* is entitled to no consideration. As written war law stands, it would be the most desperate and forlorn of expedients for a population to take arms against an occupying army of Germans, Russians, or Austrians. Baron Jomini said at Brussels:—

A population will not attempt to rise unless it believes itself to be in a position to drive out the enemy; if it succeeds in this object, the occupation ceases. If, however, it has overrated its strength, it will suffer the harsh consequences of such rising. The reprisals to which the inhabitants render themselves liable will

(2) That
of massed
risings in
occupied
terri-
tories.

teach them that they are doing no service to their country by attempting to throw off a yoke from which they cannot escape.¹

British
proposal
as to popu-
lar re-
sistance.

As a counterblast to the opinion here expressed, Sir John Ardagh, first technical delegate of Great Britain to the Hague Conference of 1899, proposed to supplement Articles I and II of the *Règlement* by the following provision :—

Nothing in this chapter is to be considered as tending to modify or suppress the right which a population of an invaded country possesses of fulfilling its duty of offering the most energetic national resistance to the invaders by every means in its power.²

The German military delegate at the Hague refused point-blank to agree to this proposal. "I cannot," he said, "take one single further step in following those who proclaim an absolute liberty of defence." The British proposal was withdrawn, but its intention was met, to some degree, by the Declaration which was prefixed to the *Règlement*, and which commends cases not legislated for, and especially those connected with Articles I and II, to the safeguard and government of the principles of International Law (see p. 9 and 10, above). The treatment accorded to a popular *levée* in an occupied country will therefore depend on the interpretation of the general principles of war law on the point ; and this will vary, no doubt, according to the views of the nation interpreting them, as indicated in the very diverse opinions expressed on behalf of Great Britain, Germany, Belgium, etc., at Brussels and the Hague.

The con-
ventional
law of war
as to
belliger-
ent quali-
fications
needs
amend-
ment.

It cannot be pretended that the two great International Conferences have left the question of belligerent qualification in a very satisfactory state. The very important question of risings in an occupied territory has not been legislated for at all, and as regards unoccupied districts, two Articles have been approved which are to some extent mutually destructive. The one—Article I—is designed to meet the views of the great Continental Powers who have adopted universal service and who look askance at all unorganised resistance. The other—Article II—is the tribute of the Conferences to the divine right of national defence. One may almost say that the delegates endeavoured to reconcile the elements of sheer, undiluted

¹ Brussels B. B. p. 265.

² Hague 1 B. B. p. 199.

militarism and sheer, undiluted patriotism (if one may so call the view which champions spontaneous, unorganised, national resistance), and that the solution has not resulted in a successful chemical blend. Instead of drafting a single Article which would satisfy the two conflicting interests, the delegates have almost shirked their task—a task of very great difficulty, it must be admitted—and have tried to satisfy both, separately, in a way that will hardly, in practice, be found to please either. The German General Staff, in its official manual, boldly refuses to give effect to Article II. It admits that weak nations can never be deprived of the right to defend their soil by resorting to the *levée en masse*—the call of the nation to arms; and it admits further that the Hague *Règlement* has, in terms, secured belligerent privileges for such *levées* without requiring them to fulfil the conditions demanded of regulars, militia, and volunteers; but it goes on to affirm, in words which are undoubtedly weighty and which would be weightier still if the German delegates had not agreed to Article II at the Hague, that to demand the fulfilment of these conditions of a *levée en masse* is in no wise to hinder the population from taking arms, but only to oblige it to do so in conformity with accepted rules. The official jurist quotes and endorses the view of Lueder that the demand for subordination to responsible chiefs, for a military organisation, and for distinctive marks, cannot be given up without engendering a strife of individual against individual which would be a far worse calamity than anything likely to result from the restriction of combatant privileges.¹ Professor Ariga, too, speaking out of his experience of a great modern war, holds that Article II seems to destroy Article I, and asks, “ought not this Article (II) to be suppressed as it always gives rise to discussion?”² To this it is unlikely that the smaller Powers and England will agree, but there does not appear to be any insuperable difficulty involved in requiring massed *levées* to be commanded by some responsible chief, even if the condition as to distinctive marks is waived. Indeed, the new provision as to the payment of an indemnity seems to make it essential that the *levée* shall be subordinate to a leader

The
German
official
view

¹ *Kriegsbrauch im Landkriege*, pp. 7-8.

² Ariga, *op. cit.* pp. 86-7.

Suggested
line for
amend-
ment.

who is responsible for its actions. It is idle to suppose that the question is settled. There must be something amiss with a solution which one great Power finds impracticable in war and which another flatly refuses to accept. Passive resistance and the demand for repeal are evidences of unsuccessful legislation. The question must be threshed out again; if handled with courage and in a reasonable spirit of compromise, it appears quite capable of being satisfactorily legislated for. The points which have to be provided for seem to be, roughly, the following:—

To be entitled to belligerent rights, troops must fulfil the following conditions:—

(1) They must present some guarantee that they are civilised troops, not bandits; therefore they must

(a) in actual practice, observe the laws of war, and

(b) be commanded by a responsible chief, who shall be answerable for their conduct.

(2) Their status as active enemies (as distinct from the peaceable inhabitants) must be quite apparent; therefore they must

(a) carry arms openly;

(b) have a uniform or a distinctive, external, irremovable mark to indicate their character. But this last condition may be waived in the case of the population of an unoccupied district which rises on the enemy's approach, provided that the other conditions specified above are complied with. Detached individuals or small bodies of such a *levée en masse* must be prepared to prove their permanent belligerent character either by external distinguishing marks or by satisfactory documentary evidence that they act under the orders of the commander of the *levée*.

I make no suggestion, it will be seen, as regards risings in an occupied district, and such *levées* would therefore not be entitled to combatant rights, *under conventional war law*, unless they complied with the conditions (1) (a) and (b) and (2) (a) and the first sentence of (2) (b).

A few remarks are necessary as to the wording of the three Hague Articles.

The four
conditions
of Article
II. must
be united.

Article I. The four conditions must be united, to secure recognition of belligerent status.¹

¹ Brussels B. B. p. 252.

The "distinctive emblem" does not mean a uniform. The delegates of Norway and Sweden had pointed out that the Norwegian Landsturm did not wear a full uniform. But the sign must be fixed—externally, so as not to be assumed or concealed at will.¹

At the Hague Conference of 1907, Germany proposed that notification of the distinctive emblem should be provided for, but the proposal was defeated in committee.

At what distance should the sign be recognisable? The German authorities demanded in 1870 that the French irregulars should be distinguishable at rifle range. This, says an eminent English jurist, is "to ask not only for a complete uniform but for a conspicuous one."² When rifles are sighted to 2,000 yards and over, the German requirement is clearly unreasonable. If the sign is recognisable at the distance at which the naked eye can distinguish the form and colour of a person's dress, all reasonable requirements appear to be met.³ At the commencement of the Russo-Japanese War, the Russian Government addressed a Note to Tokio, stating that Russia had approved the formation of certain free corps composed of Russian subjects in the seat of war, and that these corps would wear no uniform but only a distinctive sign on the cap or sleeve. Japan replied:—

The Japanese Government cannot consider as belligerents the free corps mentioned in the Russian Note, unless they can be *distinguishable by the naked eye from the ordinary people* or fulfil the conditions required for militia or volunteers by the Hague *Règlement*.⁴

"Volunteers" is intended to cover "free corps" (*les corps francs*).⁵

Article II. The word "spontaneously" indicates a concession or a sufferance. "This is demanding less than if an order of

¹ Brussels B. B. pp. 252-3, 256.

² Hall, *International Law*, p. 523.

³ Pillet, *Les Lois Actuelles de la Guerre*, p. 43.

⁴ Ariga, *op. cit.* pp. 85-6. (It was not, of course, a question here of a *levée en masse*, for Japan was not invading Russian territory.) Even when a complete uniform is worn, there is always the probability of mistaking the nationality of individual officers or men. The Russians sometimes mistook the English officers, in their grey coats, for Russians in the Crimean War. (Kinglelake's *Crimea*, Vol. V, p. 379.)

⁵ Brussels B. B., p. 293.

The distinctive emblem.

Notification thereof not required.

Distance it must be recognisable at.

"Volunteers."

"Spontaneously" indicates a concession.

the Government were required, which might often not reach the volunteers" [i.e. *levée*].¹

So does
"terri-
tory."

The word "territory" was used instead of locality because the latter might imply that, in a territory containing various towns and villages ("localities"), each separate locality must abstain from action till actually threatened. This would render the principle of a *levée en masse* illusory.²

"Parties" not
"States." Article III. The word "parties" was adopted in preference to "States," as including such non-State belligerents as the "Sunderbund," the Secessionists, etc.³

The word
"non-
combat-
ants" used
in two
senses.

The non-combatants dealt with in this article form an integral part of an army. The word "non-combatant" is used in two different senses in war law. (1) It is used of the non-military inhabitants of a country which is the seat of war, who take no part in the conflict, and who, if they feel the effect of the backwash of the war, only do so because of the ample sea-room which belligerents require. (2) It is used, as in this Article, of the troops, commissioned and enlisted, forming part of the regular, militia, or volunteer organisation whose function is ancillary to that of the fighting men and who do not themselves oppose the enemy arms in hand. The troops of the commissariat and intendance, of the veterinary service, of the pay and accounting department, orderlies, clerks, bandsmen, are non-combatants in the sense of Article III. So, too, are the medical *personnel* and army chaplains, who, however, are further protected by the Geneva Convention. At Brussels it was proposed that a clause be inserted stating that non-combatants of this kind "are exposed to the same vicissitudes and dangers of war as the corps to which they are attached, but that they can only be engaged in an isolated combat in consequence of a mistake and that they have the right to defend themselves." The proposal was not pressed, the committee having agreed that this clause was "understood."⁴ The non-combatants referred to cannot, of course, claim any preferential treatment if they abandon their proper duties and take an active part in hostilities. "All these persons have not the right to use force; they are not combatants strictly speaking."⁵

¹ Brussels B. B. p. 293. ² *Ibid.* p. 294. ³ *Ibid.* p. 259. ⁴ *Ibid.* p. 258.

⁵ Bonfils, *op. cit.* sec. 1089. As to military non-combatants generally, see Pillet, *op. cit.* pp. 47-8.

A modern instance of a *levée en masse* is found in the Boer forces who fought in the war of 1899—1902. Although Article II of the *Règlement* refers only to resistance to an invading army and its extension to the case of a *levée* who act on the aggressive and carry the war into the enemy's country (as the Boers did) is doubtful, the English Government did not take up the position that their opponents lacked belligerent status. Although the Transvaal and Free State Governments were not parties to the diplomatic act of the Hague, its principles were adhered to by both belligerents during the war. The Boer forces did not fulfil all the conditions of Article I of the *Règlement*, and therefore, for the purpose of classification, they would seem to come under Article II rather than Article I.¹

Modern
levées en
masse:
The
Boers.

In the Russo-Japanese War, Professor Ariga relates that the Japanese took advantage of Article II of the Hague to organise a levy at Niou-tsia-toun, a town in the rear of the Japanese army of Manchuria, against which General Mistchenko made a raid in February, 1905, through neutral territory. The individuals who were mustered to defend the town wore no distinctive sign and only carried pistols, which could not be considered arms "carried openly." As the Hague condition that a *levée en masse* must carry arms openly was not then in force (being added at the Conference of 1907), Professor Ariga considers that the requirements of Article II were fulfilled and that the men were legitimate combatants.² This case is

Instances
in the
Russo-
Japanese
War—one
legiti-
mate,

¹ *The Times Historian of the War* (Vol. II, p. 274, note) is of opinion that the British Government should have stated at the outset that it would refuse to treat ununiformed commandos of the Boers as belligerents on British soil. "A declaration that all armed men made prisoners on British territory, and not wearing some permanent and easily recognisable uniform or badge marking them as belonging to the Republican forces, would be treated as bandits and be liable to be shot without ceremony, would have had an excellent effect and might have delayed or possibly have even altogether prevented an invasion, while it would have been in perfect conformity with the Hague Convention on the Laws and Customs of War (Articles I and II)." It is here assumed that a *levée en masse* must wait within its own borders, and cannot retain its combatant status if it acts on the offensive, though to do so may be its only possible effective mode of defence. This assumption is at least open to argument, and one shudders to think of the retaliations which might have ensued had the British Government acted upon it.

² Ariga, *op. cit.* pp. 82-4.

particularly instructive as showing the application to the inhabitants in the *rear* of an army of a provision which was discussed and sanctioned in connection with the defence of an otherwise undefended territory by its massed citizens. The analogy is clear and Professor Ariga's ruling seems sound.¹

the other
illegiti-
mate.

An instance of an illegitimate *levée en masse* occurred in Saghalien in the same war. When the island was occupied by the Japanese in July, 1904, the town of Vladimirovka was defended by volunteers who had no commander, no uniform, and could not be distinguished from the ordinary inhabitants with whom they were mingled. They were armed with hunting rifles, pistols, lances, and hatchets. About 150 or 160 were taken prisoners by the Japanese, and of these 120 were condemned to death by court-martial. They were not belligerents conforming to Article I of the Hague, and Article II gives combatant status only to men who "respect the customs and laws of war." These Saghalien volunteers were Russian convicts who could not have any acquaintance with the laws of war, and Professor Ariga holds that they were rightly condemned on this ground. At the court-martial an additional reason for condemning them was advanced, namely, that Article II only refers to ordinary inhabitants taking up arms to defend their homes and country, and cannot refer to such a case as the defence of a convict island by the convicts thereon.²

With the grounds for condemnation given in Professor Ariga's book I cannot entirely agree. Human character is complex, and even a convict may be a patriotic citizen, eager to defend the soil of the land whose laws he has broken. He is no more necessarily ignorant of the laws and customs of war than the chance citizen who takes arms in a *levée en masse*. However, in this particular Saghalien case, the facts that the Volunteers were undistinguishable from the peaceable population, either because they wore no distinctive marks or because they had removed such as they had, and took no steps to separate themselves into a defined, though not necessarily uniformed or organised, band, seem to me to have been

¹ Ariga, *op. cit.* p. 89.

² *Ibid.* pp. 86, 87.

sufficient warranty for the drastic measures adopted. An invader must know who are his active foes and who are non-combatants, and it is only to a body of men whose combatant character is clear and unmistakable that he can, with due regard to his own interests, allow belligerent rights under the second article of the *Règlement*.

There is a good deal of misconception as to the position of Guerilla war in International Law. In the *Three Years' War*,¹ Christiaan de Wet is at pains to show that his was not a guerilla but a legitimate warfare.² The fact is, of course, that it was nothing but guerilla war, and was perfectly legitimate. Guerilla war is but one of the many methods of making war. It is a war of "fighting and running away," of pin-pricks instead of sabre-cuts. It is "a system of surprise marches, of attacking the enemy's weak points, of cutting their railways, of seizing their isolated garrisons, and of skilfully avoiding capture by rapid flight from pursuing columns."³ Guerilla fighters make the enemy's communications, convoys, stragglers, the chief object of their attacks. But, provided always they act on behalf of a recognised belligerent Government, and comply generally with the Hague conditions for belligerency, they cannot be considered unlawful combatants by reason of their methods of war. "You will search the Hague *Règlement* in vain," says General den Beer Portugael, the eminent Dutch soldier and authority on International Law, "for any disposition forbidding war by small bodies of troops, or guerilla war."³ In the Secession War, the Confederate leaders, Wheeler (who lived to command the United States cavalry in Cuba), Forrest, Morgan, and Mosby, carried on this form of warfare independently of the regular operations of the main Southern armies, and the Washington Government showed no disposition to treat them as unlawful belligerents. When, however, upon the surrender of Lee's and J. E. Johnston's armies and the collapse of the Confederacy, certain of the Confederate commanders were thought to be contemplating a continued resistance on guerilla lines, the Federal authorities refused to regard such

¹ *Three Years' War*, p. 282.

² *Times History*, Vol. IV, p. 260, on De Wet's tactics.

³ *Revue des Deux Mondes*, 1st November, 1901, p. 49.

guerilla bands as possessing belligerent status. On 17th May, 1865, Grant wrote to Sheridan :

If Kirby Smith [a Confederate general] holds out, without even an ostensible Government to receive orders from or to report to, he and his men are not entitled to the consideration due to an acknowledged belligerent. Theirs is the condition of outlaws, making war against the Government having an existence over the territory where war is now being waged.¹

One of the phases of guerilla war is the employment of isolated individuals or small bodies of marksmen to delay the enemy's movements by means of a desultory "sniping" from cover. In the Cuban Campaign of 1898 the American troops suffered much loss in consequence of Spanish guerillas of this kind, who posted themselves in trees and fired therefrom upon any parties of the enemy who exposed themselves. They were accused of firing on the doctors, litter-bearers and wounded, and some were said to have donned American uniform, but it is doubtful if such breaches of the laws of war could be proved against them. It may be, as the very impartial American historian, Mr. Titherington, observes, that the adoption of this form of fighting was "a blemish upon Spanish chivalry," since it "adds to the horrors of war but could never win a battle or change the course of a campaign."² But it is capable of being justified on the ground that it may delay an advance and affect the moral of an opposing army, and it is not forbidden by the existing laws of war.

Maraud-
ers.

An instructive ruling was issued in this connection by the British authorities during the South African War; after declaring that "marauding" is an offence punishable by death, it defines marauding as follows:—

Marauding consists of acts of hostility committed by persons not belonging to an organised body authorised by a recognised Government.³

In the *Papers relating to Martial Law in South Africa* one may

¹ Sheridan's *Memoirs*, Vol. II, p. 208.

² Titherington, *History of the Spanish-American War*, p. 243. See Roosevelt, *The Rough Riders*, p. 172; J. B. Atkins, *The War in Cuba*, pp. 153-5.

³ Quoted Blue Book, *Papers on Martial Law, South Africa* (Cd. 981), p. 16.

find a record of two Boers being sentenced, at Harrismith, Orange River Colony, to two years' imprisonment with hard Labour, for "committing an act of hostility as a marauder by firing on British troops when not on commando." Shortly before this (October, 1900), no fewer than sixteen Boers were sentenced to various terms of imprisonment for (in each case) "committing an act of hostility—he at the same time not being a person belonging to any commando or organised military body authorised by any recognised Government, nor under any military orders of any officers of any Government." The sentences in these latter cases were commuted to deportation as prisoners of war.¹ In many cases, snipers were punished by having their farms burnt down. One finds, for instance, in the Return of buildings burnt between June, 1900, and January, 1901, that the farm of a certain burgher was destroyed because "his men never offered organised resistance, but sniped scouts from the hills," also the farms of two other men who "were warned that if they did not either join a recognised commando or surrender, their houses would be burnt"; and six others were similarly punished for not heeding a warning to cease sniping.² The action of the British military authorities in these cases was justified by the special circumstances of the war. The combatant Boers could not be distinguished from those who had taken the oath of neutrality or had not borne arms at all; the only distinctive feature of the authorised Boer forces was the coherent commando, and the men who carried on an isolated guerilla or sniping war could not complain if they were assumed to be unauthorised combatants. They fought at their own risk in more senses than one. To prevent "marauding," it was necessary for the British troops to treat all snipers as marauders in the absence of proof to the contrary—which could only be supplied, if then, in the event of the snipers being captured. But the English Government went too far when it proscribed all guerilla fighting, as it did later on. Both

¹ Quoted Blue Book, *Papers on Martial Law, South Africa* (Cd. 981), p. 201.

² *Return of Buildings Burnt in each month from June, 1900, to January, 1901* (Cd. 524). See also *Correspondence, etc. between the Commander-in-Chief, South Africa, and the Boer Commanders, as to destruction of property* (Cd. 582), p. 13.

British
views
as to
guerilla
fighting
in South
Africa.

Republics had been annexed in 1900, but neither was conquered until nearly two years later. Their Governments were still in existence, and if they had no settled abode but issued their orders from a railway carriage, a northern village, or a farmhouse in the safety of a mountain fastness, they were still a factor in the political situation and their authority was recognised by the leaders in the field. Mr. Gibson Bowles pointed out in the House of Commons that King David himself was once a "perambulating Government." It cannot be said that, in the latter half of the year 1901, the Boer armies had been overcome in the same manner as the Confederate armies in 1865. But Lord's Kitchener's Proclamation of 7th August, 1901, took up the position, which was strongly supported by Mr. Chamberlain at home, that combatants in small bodies, who were not able to repel the invader, but only to harass him, were not proper belligerents; and on this ground pronounced sentence of banishment against all leaders who should not have surrendered by 15th September of the same year.¹ The opinion of continental jurists condemned this Proclamation, which was moreover denounced in the House of Commons by so eminent an authority as Sir William Harcourt. In a letter to *The Times*, Sir William quoted from a despatch of the Duke of Wellington, dated August, 1809:—

The guerillas should be employed on the enemy's communications . . . They should avoid general actions, but should take advantage of the strong posts in their country to defend themselves and harass the enemy.²

¹ *Proclamations from 1900–1902*, Pretoria, 1902, pp. 154–5; De Wet, *op. cit.* p. 32; *Times History*, Vol. V, p. 322.

² *Times*, 8th November, 1901. The Spanish guerillas in the Peninsula are the stock "shocking example"—the "Helot in his cups"—for those who condemn guerilla warfare without reservation. They were undoubtedly guilty of many excesses. "Theirs was a war of extermination. None of those courtesies which render modern warfare endurable were granted to their opponents; the deadliest hostility was unmitigated by success, and when vanquished, expecting no quarter from the French, they never thought of extending it to those who unfortunately became their prisoners" (Maxwell's *Wellington*, Vol. II, p. 149, from Southey). The French retaliated by atrocities on their part. Some of the guerillas who were captured in the mountains of Guadarama were nailed to the trees and left there to expire slowly of hunger and thirst. To the same trees, before a week had elapsed, a similar number of French soldiers were affixed by the guerillas (p. 151).

In the end the Proclamation became a dead letter, the sentence of banishment never being executed.¹ It forms, therefore, no precedent for action in future wars and, in any case, even if the threat had been acted upon, one would have to regard the case, juridically, as one of those referred to in my first chapter in which the peculiar political status of the Transvaal before the war was held, rightly or wrongly, to affect its status as a belligerent Power also, and to suspend for certain purposes the applicability of the ordinary rules of International Law.²

Another case in which the question of belligerency may arise is that of the employment of troops of a non-European race, or at least of a race of inferior civilisation to the belligerents, in a civilised war. To employ savage troops is clearly improper, for

Employment of semi-civilised troops.

The guerillas in Spain were more akin to a *levée en masse* than to guerilla fighters in the proper sense, i.e., regular combatants who carry on "la petite guerre," like the Confederate guerillas in the Secession war, or the Spanish guerillas in Cuba.

¹ See Despagnet, *La Guerre sud-africaine*, pp. 347, 350.

² See *Times History*, Vol. IV, p. 495.

Some writers would confine the term guerilla war to a war which is continued by the more desperate elements of a hostile army after the defeat and capture of their main forces, the occupation of their territory, and the downfall of their Government; in other words, such a continued resistance as Grant refers to in the letter quoted in the text. But this is merely *illegitimate* guerilla war, and there is a legitimate kind too. (See Oppenheim, *International Law* (1906), Vol. II, p. 67.) The various kinds of guerillas or partisans are well distinguished in the *American Instructions*, paragraphs 81, 82, 85:—

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or making inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, Government or not.

they are of their nature predisposed to fail in the fourth condition of Article I of the *Règlement*, and officers cannot be ubiquitous. There is an unedifying and unforgettable page in military history which deals with the scalplings and torturings of the Red Indian allies of the English, French, and Continental armies in the American wars of the 18th century. To-day, however, the Colonial indigenous troops of the European Powers are, for the most part, as highly disciplined and trained as any troops can be. Against such troops there is no law. The black man who has been "drilled white" is under no disability as a fighter in the eyes of International Law. There is nothing, save perhaps policy, to forbid Great Britain employing her Sikh or Gourkha regiments, or France employing her Algerian troops, against another European Power. The French Turcos of 1870-1 were accused of cruelty by the Germans, as they had been by the Austrians in 1859, but the truth of the accusations is very doubtful.¹ The Special Correspondent of the *Daily News* says that all those he saw in Paris in 1870 were "as mild in demeanour and in visage as orthodox curates."² Perhaps their "full Day-and-Martin colour"³ was sufficient to condemn them in advance in Prussian eyes as capable of any atrocity. Individual cases of irregular conduct are alleged against even highly disciplined white troops in every war, and often with good reason: it is the general behaviour of troops which should be considered before they are condemned. But even where the conduct of troops of an inferior race is unimpeachable, their employment may be a mistake as a matter of policy. Perhaps it was so in the case of the Turcos in 1859 and 1870; it was certainly so in the case of the negroes in the Secession War. The southern States appealed to arms on what was practically the issue of Home Rule; the Federal authorities, holding that the Union was one and inseparable, sent the flower of the north to recover the seceded territory. The great drain of men from the Federal States, and the change in the character of the war which was wrought by Lincoln's Emancipation Proclamation of

¹ See De Martens, *op. cit.* p. 356; *R.D.I.* 1898, p. 753.

² *Daily News War Correspondence*, p. 101.

³ *Memories and Studies of War and Peace*, by Archibald Forbes, p. 91.

1st January, 1863, which transformed a war of repression into a crusade for freedom, together led to the general employment of black soldiers by the Union commanders.¹ In the light of events, the wisdom of this policy, part though it was of a noble conception, seems very open to question. The Unionists gained but little military advantage from the black troops, and the Secessionists were so deeply enraged and embittered by the employment against them of their former slaves that the struggle acquired a character of cruelty and malignancy which it had lacked before. The Richmond Government declined to regard the negroes as lawful belligerents. No mercy was shown them by the Confederates in the field.² The terrible affair of Fort Pillow shows how the Confederate troops, humane and chivalrous towards foes whom they regarded as equals, could throw aside chivalry and humanity when dealing with the despised negroes. Fort Pillow, a station on the Mississippi, was garrisoned by coloured and white troops. The Secessionist General, Forrest, appeared before the fort in April, 1864, and having sent in an unavailing summons to surrender stormed the place. The scene which followed surpasses, for sheer horror, anything in the history of war. The sack of Magdeburg in 1631 by "the fiery Pappenheim" yielded a richer harvest of slaughter, but Fort Pillow can boast of an ingenuity of cruelty and devilish vengeance which places it all by itself in the list of stormings, and one has to remind oneself that the events took place less than fifty years ago and were the work of civilised troops in a civilised land. When the fort was carried the garrison fled and sought refuge in the houses, whence they were dragged and slain without mercy and without distinction. The black soldiers were slain "because they were niggers," the whites "because they were fighting with niggers."

Mistake
of em-
ploying
black
troops in
Secession
War.

The affair
of Fort
Pillow.

¹ But Sherman employed none.

² Draper, *op. cit.*, Vol. II, p. 167. When the Federals attempted to force an entry into Petersburg on 30th July, 1864, by exploding an immense mine under one of the redoubts, negro troops were selected to lead the assault through the breach. The attempt failed and the blacks retreated into the crater formed by the explosion. There they were shot down by the Federal soldiers themselves, to save them from the worse fate which would have befallen them had they been captured by the Secessionist troops. *Century Magazine* ("Battles and Leaders"), Vol. 34, No. 5, p. 776.

The Committee of Congress on the Conduct of the War appointed a sub-committee to go to such places as they might deem necessary, and take testimony in relation to the Fort Pillow massacre. Their report presents facts in connection with this massacre of the deepest atrocity. Men were not only shot in cold blood and drowned, but were even crucified, buried alive, nailed to the floors of houses, which were then set on fire. "No cruelty," says this committee, "which the most fiendish malignity could devise was omitted by these murderers!" From three to four hundred men are known to have been killed at Fort Pillow, of whom at least three hundred were murdered in cold blood after the fort was in possession of the rebels, and our men had thrown down their arms and ceased to offer resistance.¹

The individual instances of inhuman cruelty which this sub-committee established are beyond belief. A white officer, John C. Akerstrom, second Lieutenant, Company A, 13th Tennessee Cavalry, was nailed through his hands and feet to the side of a house, which was then set on fire.² Some black sergeants were similarly nailed through the hands to logs, which were then set on fire.³ Evidence was given by eye-witnesses, who had seen the dead body next day, that a black soldier was nailed through his clothes and cartridge box to the floor and that, when found, his face bore witness in its distortion to the agony of his death.⁴ A coloured private of the 6th U.S. Heavy Artillery testified that he saw one man buried alive and that this unfortunate moved several times after the earth was thrown over him. "No event of the Civil War," says Dr. Draper, "was in a moral point of view more detrimental to the Confederacy than this murder of the garrison at Fort Pillow. Christianity everywhere was shocked."⁵ "It is hoped," said Forrest in his despatch relating to the affair, "that these facts will demonstrate to the northern people that negro soldiers cannot cope with southerners,"⁶ and General Stephen Lee, Forrest's superior commander, tried to justify his lieutenant's action by saying—"You had a servile race armed against their masters and in a country which had been desolated by almost unprecedented outrages."⁷ It is said that Forrest gave orders to stop the firing and perhaps his

¹ Draper, *op. cit.* Vol. III, p. 216.

² *Ibid.* p. 216.

³ *Ibid.* p. 217.

⁴ *Ibid.* p. 216.

⁵ *Ibid.* p. 218.

⁶ Grant, *Memoirs*, p. 417.

⁷ Draper, p. 216.

troops got beyond his control in the confusion of the attack.¹ But nothing can relieve a general of responsibility for atrocities committed by his command. It is a reproach to the Confederate War Department that Forrest was not sent before a court-martial. Like the murder of the helpless Delhi princes by our own "Hodson of Hodson's Horse" in the Mutiny days, the affair of Fort Pillow will always be a stain on the memory of a brave and skilful officer, of which no military achievement, though it were so illustrious a service as the covering of the retreat from Nashville, ought to be able to clear him in the eyes of the historian. It was bad war and bad humanity, through and through. But its interest, for my purpose, is that it shows how the intervention in a civilised war of troops which one belligerent considers uncivilised may demoralise the conflict.

In the Russo-Turkish War of 1877-8, the methods of the Bashi-Bajouks and the Circassians on the Turkish side and of the Cossacks on the Russian side, gave rise to mutual protests. The former appear to have been ill-disciplined and more intent on plunder than on legitimate fighting.² Indeed the value to any cause of a body of troops like the Circassians, who, upon one of their number being punished for sheep-stealing and murder in 1877, deserted *en masse*, is so dubious as to make their employment inadvisable on grounds of military expediency.³ As regards the Cossacks, Professor de Martens, while admitting that they have an evil reputation in Western Europe, points out that "they are just as much subject to the bonds of military discipline as any other regiment in the Russian Army."⁴ However this may be, the peculiar nature of Cossack warfare, which is that of guerilla bands rather than of regular cavalry, would seem to give them both scope and temptation for pillage and even cruelty, of which troops of this kind, hardly yet fully civilised, would not be slow to take advantage.

¹ Sherman, *Memoirs*, Vol. II, p. 12. He adds that "at that time there is no doubt the feeling of the southern people was fearfully savage in this very point of our making soldiers out of their late slaves, and Forrest may have shared the feeling" (p. 13).

² De Martens, *op. cit.* p. 356 ff. As to the conduct of Cossacks and Bashi-Bajouks in this war, see Boyd Wheaton's *International Law*, sec. 344a.

³ Vizetelly, *Reminiscences of a Bashi-Bajouk*, pp. 186-8.

⁴ De Martens, p. 357.

Black
troops
used in
Spanish-
American
War.

The United States Government employed whole regiments of negro troops against Spain in the war of 1898.¹ "These blacks," says Professor Le Fur of Caen University, in the *Revue de Droit International*, "were American citizens, and they respected the laws of war; consequently Spain could not make any complaint on this subject."² More open to blame was the acceptance of the aid of the Cuban insurgents, who sometimes "horrified their American allies by shooting prisoners and looting a captured town (Arroyo Blanco)."³ The nature of the war—the freeing of Cuba from Spanish misrule—rendered the recognition and employment of Gomez and his levies by the American commanders a matter of necessity, which the latter must frequently have regretted.

Anglo-
Boer War:
coloured
troops
employed.

In the Anglo-Boer War, both belligerents endeavoured for political reasons to make the struggle a "white man's war." Unfortunately a succession of circumstances led to the gradual, if perhaps unconscious, modification of this initial policy. The native Indian forces, who would have been admirably adapted to the veld and mountain warfare of the earlier stages of the war, were never used against the Boers. But even as early as the battle of Colenso, Kaffir drivers were employed with artillery and ammunition wagons,⁴ and from the first constant use was made of the services of Kaffir spies.⁵ At Mafeking and elsewhere, natives joined in repelling Boer attacks by which they thought themselves threatened, but which were really directed against the English forces.⁶ The British commanders, it is only just to add, did their best to discountenance the help of such allies. On the other hand, the Boers, knowing from

¹ The Cavalry Divisions in Cuba, under Major-General Joseph Wheeler, comprised two coloured regiments—the 9th and 10th Regular Cavalry. (Roosevelt, *The Rough Riders*, p. 73.)

² R.D.I. 1898, p. 753.

³ Titherington, *op. cit.* p. 150. See Pillet, *op. cit.* p. 98; and R.D.I. September–October, 1898, pp. 754–5.

⁴ Colonel Long's guns were driven by native drivers, who bolted the moment the Boers opened fire and thus contributed to the loss of the guns subsequently. (*Times History*, Vol. II, p. 442.)

⁵ *Times History*, Vol. II, p. 139. The writer of this volume of the *History* says the British used no natives for fighting purposes, which is flatly contradicted by the writer of Vol. V, pp. 249–50.

⁶ *Times History*, Vol. II, pp. 140, 298, and Vol. IV, p. 204; Despagnet, *op. cit.* pp. 122–3.

long experience the value and the danger of native spies, and believing that the British were employing Kaffirs as combatants, adopted methods of reprisal against all suspected natives; and these methods often amounted to nothing but cold-blooded murders.¹ In consequence, the natives employed by the British troops were given arms for the purpose of self-defence, and it was but a short step from this stage to their employment for aggressive military purposes.

"As time went on, most columns came to be accompanied by parties of armed native scouts, who did most valuable service. . . . It would be an abuse of terms to describe these scouts as non-combatants. Nor were night-watchmen on block-house lines (for this was another instance) any less truly combatants than the soldiers within the block-house. . . . The only justification was sheer military necessity and this was the answer given to the protests of the Boer leaders."²

So much a matter of course did the employment of coloured forces become that Lord Methuen had a whole coloured squadron of Cape Boys and Bastards with him when he marched against De La Rey in February, 1902, before the action of Tweebosch.³

In the war with Russia, Japan employed as volunteer corps the Manchurian bands of Chunchuses, who inhabit the mountainous districts of that country and live in a practical state of independence of the Chinese Empire. M. Ninakawa, in his work of the Russo-Japanese War (quoted by Professor Ariga) endorses the Russian protest against the employment of such allies: "Their employment," he says, "was a disgrace for the Japanese nation, seeing that the Chunchuses are barbarians, criminals, and pillagers." Professor Ariga disagrees and holds

Chunchuses employed by Japan against Russia.

¹ *Times History*, Vol. V, pp. 251, 437, 450, for instances of murder of natives by the Boers.

² *Times History*, Vol. V, pp. 249-50. Mr. Brodrick, Secretary of State for War, stated in the House of Commons, 7th March, 1902—"It has been necessary when natives are employed as watchmen between the block-houses and on the line of railways to prevent accidents and for other purposes for which they have been employed, to arm them for their own protection. In my opinion, Lord Kitchener was perfectly justified in carrying out that course." (*Wyman's Army Debates*, Session 1902, Vol. I, p. 1185.)

³ *Times History*, Vol. V, p. 502. The writer says, "Their [*i.e.*, coloured troops] employment for war in the Transvaal was a mistake." See also Despagne, *op. cit.* pp. 122-3; Bonfils, *op. cit.* sec. 1070.

that the Chunchuses were proper combatants under Article I, the Hague. "There are," he says, "different kinds of Chunchuses, and Japan did not employ such as were robbers and criminals. Further, a belligerent is forbidden not to make use of the services of volunteers of neutral nationality, such as the Chunchuses were."¹ With such a difference of opinion between two writers of expert and local knowledge, it is very difficult to decide which is right. It is clear, however, from Professor Ariga's own statements,² that even the better kind of Chunchuses are given to robbing, not indeed the local population, but the Chinese functionaries who came to collect the taxes of their district, and the worst kind, who are admittedly all but savages, might very probably find their way into the bands of volunteers who assisted the Japanese. If there is any doubt as to the propriety of employing forces of this kind in a civilised war, the better rule is to refrain. The military advantage obtained from their assistance is usually insignificant, and complaints of violations of war law are bound to arise.

The coming of the "airship of war" will doubtless produce a fresh set of questions relating to belligerent qualifications. It is practically impossible to foresee, at present, what rules will be found necessary to regulate fighting in the new element. Most probably, maritime war law will be followed rather than terrestrial. Belligerent status will depend rather on the commission of the fighting engine, and its colours, than on the uniform, etc., of its crew. M. Paul Fauchille, who has given a special study to the subject writes as follows:—

In order to establish the difference between public and private aerostats, and between neutral and belligerent, it will be advisable for the balloon to carry at a fixed spot in its envelope the national colours, in the form of an "air standard," the appearance of which shall be different for each nation and which shall be recognisable at a great distance and notified beforehand to the Powers.³

¹ Ariga, *op. cit.* pp. 270-1.

² *Ibid.* p. 268.

³ See Bonfils, *op. cit.* sec 1440.

CHAPTER IV

HOSTILITIES—MEANS OF INJURING THE ENEMY¹

Conventional law of war:—Hague *Règlement*,
Articles XXII to XXIV:—

ARTICLE XXII.

The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE XXIII.

In addition to the prohibitions provided by special Conventions, it is especially forbidden

- (a) To employ poison or poisoned weapons ;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army ;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion ;
- (d) To declare that no quarter will be given ;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering ;
- (f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of

¹ It will be noticed that I have departed from the order of the Hague *Règlement* in the arrangement of my subject. Articles IV to XX of the *Règlement* deal with Prisoners of War ; Article XXI refers to the Geneva Convention ; Articles XXII to XXVIII deal with Means of Injuring the Enemy, Sieges, and Bombardments ; Articles XXIX to XXXI with Spies ; Articles XXXII to XXXIV with Truces ; Article XXXV with Capitulations ; Articles XXXVI to XLI with Armistices ; Articles XLII to LVI with Military Occupation. It appears to me a better plan to treat Hostilities, etc., (Articles XXII to XLI) before Prisoners of War (Articles IV to XX) ; then to take Military Occupation (Articles XLII to LVI), and finally the Geneva Convention (Article XXI). The Convention respecting the war rights of Neutrality, which was drawn up at the Hague in 1907, and which is not part of the *Règlement*, is dealt with last of all.

the enemy, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE XXIV.

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Preamble to the Declaration of St. Petersburg, and Declaration itself:—

Considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object should be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would therefore be contrary to the laws of humanity.

The contracting parties engage mutually to renounce in case of war among themselves the employment by their military or naval troops of any projectile of a weight less than 400 grammes (about 13½ ounces), which is either explosive or charged with fulminating or inflammable substances.

OTHER points of war law relating to the instruments of warfare are dealt with in the Declarations given on pages 79, 101, and 102.

The object
of war.

The terms of the Declaration of St. Petersburg and Articles XXII-XXIV of the *Règlement* are an authoritative refutation of the old saw that "All is fair in (love and) war," and also

of the contention that everything is permissible which will induce an enemy to sue for peace.¹ The civilised world has signed and sealed its approval of two great principles—the first, that the sole end of war is the overcoming of the military forces of the enemy; the second, that, to the means which may be adopted to secure this end, certain restrictive laws apply. These laws touch the craftsman in war at two separate points of contact: they regulate, in the spirit at once of some ancient guild and of the most enlightened and modern humanity, both his conduct in his craft and the tools which he may employ. In other words, they bear both upon the methods and upon the engines of warfare. With the latter point I shall deal first. The general principle of war law is this—that no engine of war may be used which is (if one may use the term) *supererogatory* in its effect. The principle results from a compromise of humanitarian and military interests, the latter—for war is war—being the more powerful interest of the two. The military commander, intent on victory, seeks to employ such instruments as will best achieve the end of war—the disabling of the greatest possible number of the enemy. Death, agony, mutilation—these he would avoid if he could: they are not ends in themselves, for the modern military leader arrogates no such divine call to exterminate and mutilate as old-world leaders—especially under theocracies—used to claim. The absurd conception that one has a “fiery gospel writ in burnished rows of steel” to preach, is happily banished from modern war. Hence commanders are quite ready to admit the claims of humanity to the extent of forgoing the use of any engine of war whose military effect is disproportioned to the suffering it entails. The explosive bullet, for instance, achieves nothing beyond the mutilation of the person it strikes; its military effect—the turning of effective soldiers into casualties—is no greater than that of an ordinary bullet would be. Killing, of course, is not forbidden by war law; neither custom nor convention prohibits the rifleman from aiming at his enemy’s heart and brain; such a prohibition would not be practical politics. But the function of the small-arm being to disable the individual, war law does prohibit the use of any

¹ See Sheridan, *Memoirs*, Vol. I, pp. 487–8.

bullet which causes an incurable and agonising wound, and simply aggravates suffering without furthering the end of war. The function of the piece of ordnance, on the other hand, is to radiate destruction around its point of impact, and therefore military effectiveness demands a latitude in the employment of such engines which it forgoes in the case of the rifle or pistol. It is really by its fruits that the engine of war is judged. The test of the lawfulness of any weapon or projectile is practically the answer one can give to the question—What is its “bag”? Does it disable so many of the enemy that the military end thus gained condones the suffering it causes?

At first sight, it strikes one that the use of certain modern engines of warfare must be irreconcilable with the sentiments of the international agreements quoted above. History has seen a diabolical ingenuity displayed in the perfecting of guns and explosives until the ripe civilisation of the 19th century witnessed the climax of the process in the invention of that portable inferno, the submarine mine, and that embodied horror, the shrapnel shell. The advance in the science of destruction has not gone without protest. Wise men and prophets have set their faces against the movement, but in vain. The Chevalier Bayard thanked God on his death-bed that he had never granted quarter to musketeers—were not sword and lance and cross-bow the weapons for knights?¹ Pope Innocent III tried without avail to have the use of projectiles forbidden in war.² Confians would not allow his seamen to fire shells.³

The Prohibition of certain warlike instruments cannot but seem the veriest sentimental cynicism when one remembers what happened at 203 Metre Hill at Port Arthur in 1904. “The mountain,” says an eye-witness:—

“The mountain after its capture would have been an ideal spot for a Peace Conference. There have probably never been so many dead crowded into so small a space since the French stormed the great redoubt of Borodino . . . There were practically no bodies intact; the hillside was carpeted with odd limbs, shells, pieces of flesh, and the shapeless trunks of what had once been human

¹ Sir H. S. Maine, *International Law*, p. 139; Farrer, *Military Manners and Customs*, p. 5.

² Bonfils, *op. cit.* sec. 1069; Pillet, *op. cit.* p. 88.

³ Holland, *Studies in International Law*, p. 65.

beings, intermingled with pieces of shells, broken rifles, twisted bayonets, grenades, and masses of rock loosed from the surface by the explosions.¹

"The corpses," says Sir Ian Hamilton, another eye-witness, "appear to be the ground itself."² It is difficult indeed to see how, in this matter of destruction, the process of the suns has improved on the age in which everything was permissible save the use of incantations. To-day, a commander has an acknowledged war right to use any weapon or explosive which, however terrible and ghastly its effects, is capable of putting out of action such a number of the enemy as to justify the incidental mutilation of individuals. "It is certain that the employment of a projectile capable of destroying an army at a blow would be legitimate under the actual principles of the law of war. It may, however, be surmised that an invention of this kind would inevitably result in the modification of the laws of war on this point."³

¹ Ellis Ashmead-Bartlett, *Port Arthur*, pp. 328, 330.

² *A Staff Officer's Scrap Book*, Vol. II, pp. 308-9.

³ Pillet, *op. cit.* p. 87. Mr. Ellis Ashmead-Bartlett (*op. cit.* pp. 185-6) relates a curious incident, of interest in this connection, which, however, is not mentioned in Professor Ariga's book and which I therefore give with all reserve. He says that in one of the August attacks on the forts round Port Arthur, an entire line of infantry, assaulting one of the positions, fell side by side in death, yet no injuries could be found on their bodies. The Japanese Staff explained the phenomenon by stating that it was due to a live electric wire which the Russians stretched across the front of the position attacked, and which instantly killed those touching it. The existence of such a wire was disbelieved at the time, but Mr. Ashmead-Bartlett subsequently obtained confirmation of the fact.

"On my way home to England [he says] I travelled on the same ship with a Russian naval lieutenant, who was Prince Umtomsky's chief staff officer on the *Peresviet*. We often talked over the siege, and one day he inquired of me if any Japanese had ever been killed by the electric wire. I repeated to him the tradition attaching to its use. He then told me in detail all the facts connected with it, he himself having been the chief electrician in the fortress, and having obtained permission to make the experiment. The wire was placed among the ordinary wire entanglements, so that it could not be discovered. The current was sufficiently strong to destroy anyone touching it. The lieutenant was never certain if it was successful, but eye-witnesses had told him they had seen a whole line of Japanese soldiers go down, in one of the early attacks, by coming in contact with the wire. Naturally its utility was short-lived, because the wire was speedily destroyed by shell fire or cut with the entanglements."

In the *History of the Russo-Japanese War*, issued by the Kinkodo

Chain-shot, etc.

The use of chain-shot, red-hot shot, pounded glass, etc., is sometimes cited as an illegitimate method of warfare.¹ The last-named was specifically banned by the original draft for the Brussels Conference. But the changes that have taken place in artillery material, and especially the rifling of cannon, have rendered such projectiles quite obsolete to-day, and the question of their legitimacy is largely an academic one. It may indeed happen, as it did more than once in the Crimea and at Port Arthur,² that improvised and unusual weapons of attack or defence—stones, for instance, or poles—are employed by troops, whose ammunition is exhausted or who cannot use their rifles or swords from their cramped situation at the moment. The use of such weapons was the subject of an interesting correspondence between General Canrobert, the French Commander, and General Osten-Sacken, the commandant at Sebastopol, in January, 1855. The former, who was evidently of the mind of Sir Lucius O'Trigger that you should kill your man "decently and like a Christian," complained that the hooked poles which the Russians occasionally used, though not forbidden by war law, were "certainly not the arms of courtesy." The Russian General replied that his men were instructed to make the enemy prisoners, if possible, in preference to killing them, and that it was for this reason that they used the weapons in question.

Controversy during the Crimean war.

Explosive bullets.

Explosive bullets were used by the Confederates at Vicksburg in 1863: it was thought that they would burst over the enemy's trenches and, exploding, have the effect of shell fire in disabling a good many men. Grant says:—

I do not remember a single case where a man was injured by a piece of one of these shells. When they hit and the ball exploded,

Publishing Co., of Tokio (Kegan Paul, London, 1904-5), I find the following official statement bearing on this incident, under the date August 20, 1904:—

"In front of the Pan-lung-shang Fort and of the North Fort of Tung-chi-kuan-shan there were wire entanglements charged with electricity, and beyond this was an endless field of ordinary wire entanglements. The Right and Central Columns endeavoured to destroy these obstacles" (p. 794).

No mention is made of any such wholesale destruction of an assaulting line as is mentioned by Mr. Ellis Ashmead-Bartlett.

¹ E.g. by Bluntschli, *Droit International Codifié*, sec. 558. See Bonfils, *op. cit.* sec. 608. Professor Westlake (*International Law*, Pt. II, p. 76) would admit red-hot shot for use against ships or fortifications, not against men; but there is no likelihood of a civilised army using it to-day.

² Kinglake, *Crimea*, Vol. VI, pp. 210, 516.

the wound was terrible. In these cases, a solid ball would have hit as well. Their use is barbarous, because they produce increased suffering without any corresponding advantage to those using them.¹

In the same year the Russian military authorities devised an explosive bullet for use against ammunition wagons and hard substances generally, and a few years later this bullet was so modified as to explode on contact with a soft substance. A bullet of such a nature would have been a deadly, if inhuman, instrument of war in the hands of any nation, and the Russian authorities, unwilling to use the bullet themselves, or to allow another country to secure the advantage of their invention, suggested that its use should be prohibited by international agreement among the Powers. This was carried into effect by the Declaration of St. Petersburg,² and since 1868 no civilised army has used explosive bullets. Expanding bullets are quite a different thing. The most famous type of the latter is the British dum-dum bullet, which was designed for use against fanatical savages, such as Afridis and Fuzzi-Wuzzies, whose rushes the small calibre Lee-Enfield bullet was found inadequate to check. The question of the admissibility of dum-dum bullets was discussed at length at the first Hague Conference; it was denounced by the representatives of all the Powers except those of Great Britain and the United States.³ With the two last-named Powers as sole dissentients, the following Declaration was adopted, with special reference to the dum-dum bullets :—

The contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions.⁴

This agreement was renewed at the Hague Conference of 1907, at which Great Britain and the United States notified their adhesion to it.⁵ Every civilised nation is therefore now bound by its terms.

Great Britain was not a party to the Declaration of 1899

¹ *Memoirs*, p. 316.

² The United States and Spain are not adherents of the St. Petersburg Declaration, but neither of these States used explosive bullets in the war of 1898.

³ Hague I B. B. pp. 63, 64, 89.

⁴ *Ibid.* p. 340.

⁵ *Ibid.* p. 14.

Expand-
ing
bullets in
the South
African
War ;

relating to expanding bullets but she did not employ such ammunition against the Boers. At the beginning of the war, all the dum-dum ammunition was recalled from South Africa,¹ and though this was officially stated to be due to the bad manufacture of such bullets as had been issued rendering them unfit for actual use,² it is not unlikely that the opinions expressed by the Hague delegates had as much to do with the withdrawal as the reason given. As a matter of fact both belligerents complained of the use of expanding bullets.³ Some individual instances may have occurred, and the fact that a British soldier committed suicide with a dum-dum bullet is evidence that the instructions for withdrawal may have been evaded in some cases.⁴ It is clear too that the Boers occasionally made use of expanding bullets. In the Parliamentary Papers relating to Martial Law in South Africa, there is a record of Boers being found guilty by military courts of carrying expanding cartridges and soft-nosed bullets in the Transvaal, Orange River Colony, and Cape Colony.⁵ An American war correspondent who served with the Boer forces relates that they occasionally cut off the points of their Mauser cartridges, thus making them expansive.⁶ And a German eye-witness who visited the Boer laager after the Paardeberg surrender, saw a number of Mauser cartridges with the points of the bullets cut off, as well as sporting ammunition which had been cut into mushroom shape.⁷ But it is quite certain that such practices were not countenanced by the responsible commanders and that any use of expanding bullets on either side was quite unauthorised.⁸

¹ Despagne, *op. cit.* pp. 111-12.

² Blue Book, *Report of the War Commission* (Cd. 1789), 1903.

³ Despagne, *op. cit.* pp. 111-12. *Revue des Deux Mondes*, 1st March, 1900, p. 44. Hansard, *Parliamentary Debates*, 4th series, Vol. LXXVII, p. 1415. Hall, *International Law*, p. 406.

⁴ Private Slight, 12th Lancers, committed suicide with a dum-dum bullet in South Africa. Wyman's *Army Debates*, Session 1902, Vol. II, p. 558.

⁵ *Parliamentary Papers Relating to the Administration of Martial Law in South Africa* (Cd. 981), 1902, pp. 126, 174, 202.

⁶ Howard C. Hillegas, *With the Boer Forces*, p. 306.

⁷ *German Official Account of the War in South Africa* (Colonel Water's translation), Vol. I, p. 212.

⁸ The fact that Lord Roberts protested against the employment of expanding bullets by the Boers is a good indication of the morally binding force of

Both Japan and Russia were parties to the Hague Declaration on the subject of expanding bullets. In the war between these Powers, the former complained of a violation of the Declaration, but an explanation similar to that given for the Anglo-Boer War could doubtless be given.¹ Japan herself seems to have been at fault at the beginning of the war in allowing her officers to carry pistol ammunition of an expanding nature. When the fact came to light, the Tokio War Office issued instructions to the armies in the field for the destruction of all such ammunition.²

Explosive hand grenades, which were freely used in the Russo-Japanese War,³ as they were in the Crimea,⁴ and Secession⁵ Wars, are not held to come under the prohibition of explosive bullets. Nor is there anything illegitimate in the use of torpedoes in land war. The Russians launched such engines from the hills around Port Arthur and no objection was raised by the Japanese to this mode of defence.⁶ In the Secession War, the Confederates made frequent use of land mines or "torpedoes," as they were then called, and though these engines were not regarded by the Federal commanders as forbidden by war usage, a disposition was shown to restrict their employment within narrow limits. The Union Generals do not appear to have shared the old sea-dog Farragut's contemptuous indifference to such new-fangled engines of war, which he expressed once and for all in his famous "Damn the torpedoes!" When Sheridan had won the battle of Yellow Tavern, where the gallant Jeb Stuart fell, and was pressing on towards Richmond, he found torpedoes planted along the road; he ordered the prisoners whom he had with him to seek them out and remove them—a duty which could be imposed on

an International Declaration relating to war usage, as effecting even a dissentient or non-signatory Government.

¹ Kinkodo Coy's *op. cit.* p. 805.

² Ariga, *op. cit.* pp. 246-7.

³ Ariga, *op. cit.* pp. 261-2. The Russians at the battle of Liao-Yang (2nd September, 1904) used "hand-grenades, the size of oranges, which blow men's bodies to pieces." (Sir Ian Hamilton, *op. cit.* Vol. II, p. 114). Mr. Ashmead-Bartlett (*op. cit.* p. 235) says these hand-grenades "asphyxiated with their fumes those who were not torn to pieces by their explosion."

⁴ Sir W. H. Russell, *Crimea*, p. 321.

⁵ Grant, *Memoirs*, p. 324.

⁶ Ariga, *op. cit.* p. 264.

prisoners of war only as retaliation for a violation of war law by the enemy.¹ H. W. Slocum, who commanded Sherman's right division in the "March to the Sea," relates that torpedoes were found planted outside Savannah, in a narrow road leading from the ferry to the South Carolina side of the Savannah river, and that several of his men were killed or wounded by treading on them. He says:—

Planting torpedoes for the defence of a position is legitimate warfare, but our soldiers regarded the act of placing them in a highway where no contest was anticipated as something akin to poisoning a stream of water. It is not recognised as fair and legitimate warfare. If that section of South Carolina suffered more severely than any other, it was due to the blundering of people who were more zealous than wise.²

It is difficult to see how torpedoes can be assimilated to poison. The latter is specifically forbidden by the laws of war, both conventional and customary, while torpedoes are not; and if they may be used against an assaulting enemy, there is no fair ground for prohibiting the use of them in the rear of a retreating army, to delay the enemy's advance. McClellan and Sherman, sounder guides on questions of war law than Sheridan and Slocum, both lay down that the planting of torpedoes in the route of an advancing army is a legitimate method of war. Both, however, condemned the practice of laying mines in an occupied territory which had been definitely abandoned by the enemy and in which they could, in any case, hardly be planted without the help or connivance of the inhabitants.³ When the Turkish army was about to occupy Larissa in 1897, it is said that its commander, Edhem Pasha, was warned that a bridge leading into the city had been mined by the Greeks before their retreat, and that, owing to this warning, the occupying troops were able to take steps to escape destruction. M. Politis condemns the act as "at once barbarous and treacherous,"

¹ Sheridan, *Memoirs*, Vol. I, pp. 380-1.

² *Century Magazine* ("Battles and Leaders"), Vol. XXXIV, p. 931.

³ *McClellan's Own Story*, pp. 326-7; Bowman and Irwin, *Sherman and His Campaign*, pp. 235-6; Sherman, *Memoirs*, Vol. II, p. 194. The eminent jurist, Pradier-Fodéré, and other writers regard the use of mines as legitimate in all circumstances. See a paper by M. Nicolas Politis, in *R. D. I.* September-October, 1897, p. 686.

on the ground that Larissa had been evacuated by the Greeks the evening before, and the Turks had the right to count upon the security of the route which led into the unresisting city.¹ But the mining of a bridge in such circumstances may be a necessary step to secure the unmolested retreat of the army which is evacuating the territory, and just as much a measure of self-defence as the fighting of a rear-guard action. The object of the act is in consonance with the proper end of war. To plant mines in a place to which there is a vague probability that the enemy's army may come, but to which non-combatants have complete access meanwhile, is almost as barbarous as to fire shells upon a concourse of peaceful inhabitants on the chance that there may be a soldier or two among them. The question of mines is of much less importance in land than in naval war; but it would be no loss of time and words if it were given some consideration at a future Hague Conference, with a view to the laying down of some definite principles on the subject, as has been done in the case of submarine mines.

Article XXIII of the *Règlement* speaks of "special conventions" prohibiting the use of certain arms or methods of war. Such conventions are the

Special
pro-
hibitory
conven-
tions.

St. Petersburg Declaration ;

Hague Declaration prohibiting the use of projectiles whose sole object is the diffusion of asphyxiating gases ;

Hague Declaration prohibiting the use of expanding bullets ;

Hague Declaration prohibiting the discharge of projectiles and explosives from balloons.

I shall deal with the first and third Hague Declarations presently. The last-named is, it will be seen, neither perpetual nor universally binding, but as between its signatories and for the period for which it runs, it is such a "special convention" as is referred to here.

An interesting case bearing on Article XXIII (a) arose during the Secession War. When Pemberton capitulated to Grant at Vicksburg in July, 1863, Joseph Johnston, who had been watching the siege in the hope of being able to help Pemberton, fell back towards the town of Jackson, closely pursued by Sherman. "In retreating he caused cattle, hogs,

The use of
poison.

¹ *R.D.I. loc. cit.*

and sheep to be driven into the ponds of water and there shot down so that we had to haul their dead and stinking carcasses out to use the water.”¹ Does an act such as Johnston’s amount to poisoning? The answer would seem to be no; provided it is made quite apparent what has been done. Cutting off an enemy’s water supply is an allowable act of war. A very usual method of bringing pressure on a besieged town is to turn a stream supplying it. Johnston’s act elicited no complaint at the time, and in a book which is used as a textbook in the American army to-day, it is expressly mentioned as a permissible method of delaying an enemy’s pursuit.² A lawful operation of war may lead indirectly to the poisoning of the enemy’s troops, but it is not the less lawful on that account. A case in point is De Wet’s brilliant exploit at Sannah’s Post of 29th March, 1900, by which he cut off the Bloemfontein water-works and thereby forced the garrison of that town to rely on the tainted wells.³ The epidemic of typhoid which resulted was perhaps due in part to another cause, which may be mentioned here as showing the limitations of Article XXIIIa). When Cronje was hemmed in by Lord Kitchener’s troops at Paardeberg in February of the same year, many of his horses were killed by the British shells. The carcasses could not be buried, and to have left them to putrefy in the narrow circuit of the laager would almost certainly have caused an outbreak of enteric among the Boers themselves. They were therefore sent floating down the Orange River, on which the British soldiers depended for their water supply.⁴ Cronje’s action was warranted by necessity and it is impossible to regard it as amounting to a deliberate poisoning of the stream.

¹ Sherman, *Memoirs*, Vol. I, p. 331. When the Boers were retreating northwards from Kimberley in 1900, they rendered the few wells they left behind in their retreat unserviceable, and in consequence the English troops suffered great losses of cavalry horses (*German Official History of the Boer War*, Vol. I, p. 159).

² *The Service of Security and Information*. By Colonel A. L. Wagner, A.A.G., U.S. Army, p. 174. See on this point Farrer, *Military Manners and Customs*, p. 29. He says it is a working rule of war that “you may not poison your enemy’s drinking water, but you may infect it with dead bodies or otherwise, because that is only equivalent to turning the stream.”

³ *Times History*, Vol. IV, p. 14.

⁴ Maurice, *Official History*, Vol. II, p. 164.

The Franco-Prussian War furnishes a grotesque incident which is of interest in this connection. A corps of female warriors, styled "The Amazons of the Seine," was formed in Paris in October, 1870; they made their existence felt in the Commune, though they did not actually take the field against the Prussians. At a public meeting it was seriously suggested that the women should carry on one of their fingers an india-rubber thimble, at the end of which was to be a small tube containing prussic acid. The enemy was assumed to be so obliging as to come within touching distance, no doubt out of gallantry, and was thereupon to be pricked with the poisoned tube. The absurd scheme was fortunately soon laughed out of existence.¹ It is safe to say that no civilised Power would allow its troops to use poison to-day. During the Anglo-Boer War, it was freely stated in the English Press that the Boers had rifled the gold-milling plants of the Rand for cyanide to poison the Natal wells and streams.² There seems to have been as little ground for this rumour as for a somewhat similar report of the early stages of the 1904-5 war, which represented the Russians as having poisoned the spring at Dalny.³ Poison was used by the Japanese in this war, but only for the purpose of destroying the Russian military dogs, and special instructions were issued by the Tokio War Office to prevent its causing harm to men or animals.⁴

At the Brussels Conference one of the delegates proposed that the following words should be added to Article XXIII (a)—
The
spreading
of
infectious
diseases.
 "or substances of a nature to develop contagious diseases in the occupied country."⁵

The President pointed out that invading armies had the greatest interest in taking every possible precaution to prevent

¹ Cassell's *History*, Vol. I, pp. 344-5.

² John Stuart, *Pictures of War*, p. 73.

³ Kinkodo Coy's *History*, p. 387. The Vice-Admiral commanding 3rd Japanese Squadron reported, June 6, 1904: "The enemy is said to have poisoned all the springs which furnish drinking water. The matter is under investigation." Later he reported: "Regarding the alleged poisoning of the wells by the Russians, the Chinese who furnished the news has absconded, and it is surmised that his object was to prevent the Japanese from utilising the water" (p. 390).

⁴ Ariga, *op. cit.* pp. 258-9.

⁵ Brussels B. B. p. 284.

their own soldiers being infected with contagious diseases. The delegate who proposed the addition declared himself satisfied with this interpretation of the Article and dropped his proposal.¹

Treach-
ery.

The word "Treachery" ² in Article XXIII (b) seems hardly applicable to an enemy's act, and one of the Brussels delegates proposed to substitute "perfidy" for it. The original word was, however, retained, as being the equivalent of the German *Meuchelmord* ("murder by treachery").³ There may quite as well be treachery under the laws of war, as under municipal law.

Assassina-
tion.

China appears to be the solitary civilised nation which has countenanced the methods of the assassin in modern war. In her war with Japan, Sung, Imperial Commissioner, is stated to have posted notices in Northern Manchuria, offering 10,000 taels for the decapitation of three Japanese generals.⁴ Other wars furnish instances of assassination or attempted assassination, but in no case can the practice be proved to have been authorised by the Government or its commanders in the field.⁵

¹ Brussels B. B. pp. 310-11.

² The *American Instructions* (paragraph 148) lay down that "the law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile Government, an outlaw, who may be slain without trial by any captor, any more than the law of peace allows such international outlawry." Bluntschli (sec. 562) states that "civilised nations regard as barbarous the putting of a price on an enemy's head."

³ Brussels B. B. p. 284.

⁴ Holland, *Studies in International Law*, p. 116.

⁵ I find a disconcerting instance of the resort to such methods in the Afghan War of 1841. Sir William Macnaghten was in difficulties at Cabul at this time, and to help himself out had recourse to tortuous intrigues, which included the employment of one Mohun Lal as a hired organiser of assassination. Lieutenant John Conolly, Macnaghten's kinsman and confidential representative with Shah Soojah, wrote to Mohun Lal, 5th November, 1841: "I promise 10,000 rupees for the head of each rebel chief." On 11th November he wrote: "There is a man called Hadji Ali who might be induced by a bribe to try and bring in the heads of one or two of the Mufsidis. Endeavour to let him know that 10,000 rupees will be given for each head, or even 15,000 rupees." Two chiefs died under suspicious circumstances, and the blood-money was claimed but refused by Mohun Lal because the heads had not been brought in. In extant letters it is on record that Macnaghten disapproved of assassination, but that is only precisely what one would expect to find on record in extant letters. (Archibald Forbes, *The Afghan Wars*, pp. 90-1.)

The assassination of Lincoln was the act of a single fanatic and was as deeply regretted in the South as in the North. Indeed, it proved an unrelieved disaster to the beaten Secessionists, for it replaced the sane and benignant rule of the great President by the repressive methods of Andrew Johnson. General B. F. Butler's government of the city of New Orleans in 1862 was so ruthlessly severe that in South Carolina a reward of 10,000 dollars is said to have been offered for his assassination¹; but the Richmond government did not approve of the step, which was characteristic of the people of South Carolina—the irresponsible spoilt child of the Confederacy. In the Franco-German War, a French paper, the *Combat*, proposed to collect subscriptions for a presentation rifle to be given to the man who should remove the King of Prussia by assassination.² Another French journal published a photograph of Bismarck, luckily a very bad one, with a recommendation that he should be assassinated.³ However criminal the publication of such matters as this may be, it can hardly be prevented by the most vigilant bureaucracy, and no Government can be held responsible for the unauthorised act of an individual fanatic.

Treachery must be clearly distinguished from “dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies.”⁴ The latter do no wrong under the laws of war. An army order issued to the British Army in South Africa on 13th December, 1900, and quoted in the earlier Blue Book on Martial Law, pointed out that treachery “must not be confounded with surprises, stratagems, or ambushes, which are allowable.” It is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colours, he could not have done. He takes advantage of his enemy's reliance on his honour. It is treachery when a man throws up his hands in token of surrender and then seizes his rifle again and shoots his trusting enemy. Three Boers were sentenced to death and

Difference
between a
sudden
raid and a
treacher-
ous
attack.

¹ Draper, *op. cit.* Vol. II, p. 345.

² Busch, *Bismarck*, Vol. I, p. 234.

³ *Ibid.* Vol. II, p. 311.

⁴ Lawrence, *International Law*, p. 437.

shot for perpetrating such an act as this on 26th October, 1900, at Frederikstad, Transvaal.¹ Another Boer was sentenced to be hanged for treachery; on 25th September, 1901, he, with two other Boers, approached a block-house under a flag of truce and asked that he might see an officer, and when an officer of the South African Constabulary went out to meet them and speak to them, shot him in full view of the block-house.² These are clear cases of treachery, for the victim was in each case disarmed by his enemy's assumption of a non-hostile character, and then, when not on his guard, shot down by the man he had trusted. There is no room in civilised war for this "stab-in-the-back" style of fighting. A surprise attack is a very different thing. When a body of Federal cavalymen made a sudden descent on "Hickory Hill" farm, in which the young Confederate General, W. F. H. Lee (son of the great commander, R. E. Lee), was convalescing from a wound, and carried him off as a prisoner of war to Fortress Munroe, they were guilty of no treachery under the laws of war. It was a fair and open raid. But the attempt to kidnap Lord Roberts during the South African War was clearly treacherous. It was organised by a paroled officer of the Transvaal Artillery, who was arrested disguised in a British uniform; he was sentenced to death by a Military Court and shot in Pretoria gaol, 24th August, 1900.³ Treachery is most often associated with the misuse of the white flag, and I shall deal with the subject later in connection with the question of the grant of quarter and of flags of truce.⁴

Article XXIII, as proposed at Brussels, contained the following modification of the present subheads (c) and (d):—

As a rule the hostile parties have no right to declare that they will not give quarter; such an extreme measure is only admissible as a reprisal for previous acts of cruelty, or as an unavoidable step to prevent their own destruction. Armies that do not give quarter have no right to claim it for themselves.⁵

¹ *Papers Relating to Martial Law in South Africa* (Cd. 781), 1902, p. 122.

² *Papers Relating to Martial Law in South Africa (Continuation)* (Cd. 1423), 1903, p. 80; Wyman's *Army Debates*, Session 1902, Vol. II, p. 1051.

³ *Papers Relating to Martial Law in South Africa* (Cd. 981), p. 122. See *International Law, as Interpreted during the Russo-Japanese War*. By F. E. Smith, M.P., and N. W. Sibley (1905), p. 88.

⁴ See pp. 92 and 224-5.

⁵ Brussels B. B. pp. 164-5.

The whole question of reprisals was left undecided at Brussels (as it still remains), and the provision as to the refusal of quarter in cases of extreme necessity was also omitted from the final project. The right of a commander to refuse quarter in such circumstances is admitted in the *American Instructions* (Article 60) and in the *Kriegsbrauch im Landkriege* (p. 16), which authorises the destruction of prisoners "in case of imperative necessity, when there is no other means of keeping them and their presence constitutes a danger to the very existence of the captors." And this view of the General Staff jurist is backed by the weightier authority of Bluntschli.¹ The *Oxford Manual*, like the French and German official manuals, is silent on the point. One can hardly say, with M. Paul Carpentier (p. 176, French translation of the *Kriegsbrauch im Landkriege*) that in one case only can the quasi-contract established between the captor and the prisoner at the moment of capture, under which the latter's life is assured, be violated by the execution of the prisoner: namely, when he plots or actually attempts to escape. For usage and theory allow reprisals to be inflicted upon prisoners of war. But there is no doubt that not only practice but all the weight of modern expert opinion are in the scale against Bluntschli's view.² As Hall remarks, "the evil of increasing the strength of the enemy is less than that of violating the dictates of humanity,"³ and modern practice has endorsed this view, in that it has seen no deliberate slaughter of men outside of "chaud medley." The Boer commandants have had the honour of setting a high example of practice in this matter. Except in the early stages of the war, they found it impossible to retain their prisoners, yet they invariably released those whom they captured and usually at once.⁴ The same was done by the British troops on

¹ Bluntschli, *Droit International Codifié*, Article 580.

² See Pillet, *op. cit.*, pp. 149-51; Bonfils, *op. cit.* sec. 1120.

³ Hall, *International Law*, p. 397.

⁴ De Wet truly remarks (*Three Years' War*, p. 281): "Whilst every prisoner which the English captured meant one man less for us, the thousands of prisoners we took from the English were no loss to them at all, for in most cases it was only a few hours before they could fight again. All that was required was that a rifle should be ready in the camp on a prisoner's return, and he was prepared for service once more." See also *Times History*, Vol. V, pp. 442, 445.

a smaller scale in the Crimea: the 17th Lancers captured many prisoners in the pursuit after the Battle of the Alma, but being unable to bring them in, allowed them to go.¹ The circumstances of the Indian Mutiny were quite exceptional from both a juridical and a practical view-point. The Sepoys were traitors, and for the insignificant British forces to have encumbered themselves with prisoners, requiring the constant surveillance of large escorts, would have been sheer quixotic madness. Consequently, practically no quarter was given to rebels throughout the campaign.² Much has been written of the ruthless vengeance of the white troops and of their method of blowing the Sepoys from the mouth of cannon (a method they learnt from their opponents), and it may be that the general refusal of quarter was impolitic at the moment, as embittering the insurgents and rendering them desperate when a milder treatment might have led to an earlier surrender³; but no one, of whatever nationality, who has read the tale of the Mutiny with its accumulated horrors, can affirm that the refusal of quarter was incapable of being justified, whether it is regarded as a retaliation for barbarous outrages, as a punishment for a treacherous mutiny, or as a sad but inevitable necessity of savage warfare.⁴ England, said the Autocrat (surely the humanest, sanest of men) to his fellow-breakfasters, took down the map of India and wrote *Delhi—Dele*, and the civilised world said Amen; and Delhi, in its misdeeds, its punishment, and the verdict of humanity thereon, stands as a type of the India of the Mutiny. Abnormal cases call for

¹ Kinglake, *Crimea*, Vol. III, pp. 286-7.

² See Sir John Kaye, *History of the Sepoy War*, Vol. III, p. 555; Kaye and Malleson, *History of the Indian Mutiny*, Vol. IV, p. 133.

³ See Sir Evelyn Wood, *From Midshipman to Field-Marshal*, Vol. I, p. 161; Kaye, *Sepoy War*, Vol. III, p. 596.

⁴ For the impossibility of giving quarter in savage warfare, see Winston Churchill, *The River War*, Vol. II, pp. 195-7, who relates that very many Dervishes had to be killed after the battle of Omdurman because they endangered those coming to bring help to them; others were put out of their misery, being terribly wounded, and others, finally, were despatched under the erroneous view that "the fewer the prisoners, the greater would be the satisfaction of the commanders," and that the refusal of quarter would contribute to the fuller "avenging of Gordon." Colonel F. Rhodes, who edited Mr. Churchill's book, but who was not present after Omdurman, combats the statement as to these last-named Dervishes.

abnormal measures. The protection of the laws of war is for men who keep these laws, not for men who break every law, human and divine.

In the British official manual of *Laws and Customs of War*, Professor Holland remarks that

It may be a question up to what moment acts of violence may be continued without disentiuling the doer to be ultimately admitted to the benefit of quarter under this clause (*i.e.* Article XXIII (c)).¹

The difficulty of granting quarter in the heat of action.

One might raise the objection to this statement that it seems to imply the existence of a war right of refusing quarter in the case of a very brave and obstinate resistance; but it undoubtedly contains a very real truth, abundantly proved in modern wars, namely, that it is often impracticable to grant quarter to troops who resist to the last moment. No war right of killing is recognised in such circumstances; it is simply the necessity of war which justifies the refusal of quarter. It must often happen that in the storming of a trench, when men's blood is aboil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender but who cannot be separated from those who continue to resist. When a whole trenchful of men show unmistakable signs of surrender, then well-disciplined troops will always grant them quarter, even at the eleventh hour. In the heavy fighting for the Tugela Heights in February, 1900, the men of the South Lancashire Regiment set an example of disciplined restraint in such circumstances which deserves the highest praise. They had lost their Colonel (McCarthy O'Leary), their nerves were highly strung by two days' fighting, and the Boers surrendered only at the last moment.

Under these circumstances onlookers were greatly impressed by the discipline shown in the fact that when the surrender took place the officers were able at once to stay the bayonets. The arms were sloped and the ranks reformed. Forty prisoners were taken.²

¹ Holland, *Laws and Customs of War*, p. 29.

² Maurice, *Official History*, Vol. II, p. 517. Sir G. White, in his despatch relating to the Elandslaagte action, states that in the final stage of the flank attack, the Boers remained lying down and firing at our men till they came within twenty yards, and then quietly asked quarter, which was invariably granted. *Times History*, Vol. II, p. 191.

But very often the storming of a trench is accompanied, necessarily, by very different scenes. Where some of the defenders of a line of rifle-pits or earthworks continue to resist (and usually a few will resist), their comrades must suffer for their bravery or obstinacy. A party in a trench must *all* surrender, genuinely and unmistakably, for a regiment, squadron, company or squad of men is not like a ship, which, when it "hath its bellyful of fighting," hauls down its colours and is clearly out of the fight. There is no such homogeneity in a unit in land war.¹ "A white flag," says Professor Holland in the British manual, "can protect only the force by which it is hoisted," and then only if every individual member of that force ceases to resist. At Spion-Kop, some of the British troops in an advanced trench on the mountain held up handkerchiefs in token of surrender, and the Boers came forward to take them prisoners; they were fired upon by the other British soldiers, and some of them and also some of the prisoners were shot. Presidents Kruger and Steyn protested against this "abuse of the white flag," but the protest cannot be upheld.² For the particular men who put up the signal of surrender to have fired on their captors would have been treachery, but

The white flag as a token of surrender.

¹ See Westlake, *International Law*, Pt. II (War), p. 75. "The admitted case in which it (quarter) is not practicable is that which occurs during the continuance of fighting, when the achievement of victory would be hindered and even endangered by stopping to give quarter instead of cutting down the enemy and rushing on, not to mention that during the fighting it is often impracticable so to secure prisoners as to prevent their return to the combat. Hence it is especially difficult to avoid ruthless slaughter in the storm of a place or of a position."

² *Times History*, Vol. III, p. 268. In a very sensible note the writer says that much nonsense has been talked about "white flag incidents," and much unnecessary outcry raised against the Boers on account of such incidents. "There can be only one valid rule, and that is for both sides to disregard all signals of surrender in a battle, except an authorised white flag from a senior officer." See also Despagnet, *op. cit.* pp. 117-18. As an instance of troops firing on their own comrades to prevent them surrendering, an incident of the battle of Spotsylvania (11 May, 1864) may be cited. Some of the hard-pressed Confederates who held the "Bloody Angle" held up signals of surrender, and when these were recognised by the Federals, sprang upon the breastworks with the intention of giving themselves up. Their comrades in the rear "poured a volley into them, killing and wounding all but a few, who dropped with the rest and crawled in under our pieces [Federal], while we instantly began firing." *Century Magazine* ("Battles and Leaders"), Vol. XXXIV, p. 306.

their comrades were not bound by their action; the surrender was not authorised and the main body of the British troops on the hill were perfectly entitled to disregard it and to fire both on their own men who surrendered and on the enemy disarming them. It is the safest rule for a commander to pay no heed to a white flag which is hoisted, in the midst of an action, by a few men who form part of a more considerable force which still resists. A somewhat similar incident occurred at Driefontein, Orange Free State, on 10th March, 1900, where some of a body of Boers raised a white flag which the rest disregarded. Lord Roberts made the usual complaint, but the action of the Boers appears to have been as justifiable in this case as was that of the British in the former one.¹ Most complaints on the subject of white flags will be found, when investigated, to be due to a misconception of the war rights of the subject.

The practical impossibility of reconciling military effectiveness and humanitarian requirements in the capture of a position led so chivalrous a commander as Skobelev to discourage the taking of prisoners in such circumstances. Count Von Pfeil, who fought on the Russian side in 1877-8, says:—

Skobelev's
view as to
granting
quarter.

There were dreadful sights to be seen on Skobelev's battlefields, for his men, well knowing that their general did not like prisoners to be made during an action, plied the bayonet with good-will.²

Another who knew "the White General" intimately points out that his great deeds were done with very small numbers and that it was sheer necessity which caused the wholesale bayoneting of captured trenchfuls of men.³ "There are circumstances," said Skobelev himself, "under which it is impossible to make prisoners—when your force is small and prisoners might prove dangerous, then it is a sad necessity which forces us to shoot them."⁴ There is evidence that the same difficulty about granting quarter was experienced in the last siege of Port Arthur. A credible eye-witness relates that when the forts around the

Difficulty
at Port
Arthur.

¹ *Times History*, Vol. III, pp. 583-4.

² Count Von Pfeil, *Experiences of a Prussian Officer in the Russian Service*, p. 208.

³ *Personal Reminiscences of General Skobelev*, by V. L. Nemirovitch-Dantchenko (English translation by E. A. B. Hodgetts, 1884), p. 165.

⁴ *Ibid.* p. 224.

city were stormed, quarter was neither asked nor given. At the capture of the North Keikwausan Fort on 18th December, 1904, "a single prisoner was taken—the usual one, who was always preserved after each attack to give information as to the condition of Port Arthur."¹

Usually impossible for pursuing cavalry to give quarter.

Another case in which the giving of quarter is often impossible is that of the pursuit of a beaten enemy. Commanders may sometimes refrain from punishing a flying and disorganised foe. Grant "had not the heart" to turn his artillery on the Confederates flying from Petersburg.² General Nicholas Smit stopped his men firing on the British troops evacuating Majuba in 1881—it was "not buck shooting," he said.³ But the stern rule of war is that a flying foe may be pounded with cannon—and "shells have not eyes," as Bismarck once remarked—or cut up pitilessly by charging cavalry, who, if they are to do their work properly, must often slay individual fugitives who wish to surrender. The Boers complained of the pitilessness of the charge of the 5th Dragoon Guards and 5th Lancers after the battle of Talana, but what happened on this occasion was no more than happens in every cavalry pursuit.⁴ There cannot be much discrimination in leaping swords. One need not approve the deliberate butchery of every individual fugitive which marked the pursuit of the Black Brunswickers after Waterloo, in recognising that the rôle of cavalry in completing a victory must usually preclude the possibility of giving quarter.⁵

¹ E. Ashmead-Bartlett, *Port Arthur*, p. 356. Professor Ariga makes no mention of this general refusal of quarter to the garrisons of the forts, but his silence in such a connection does not disprove the fact. In *The Campaign with Kuropatkin*, Douglas Story says (p. 251), "The white flag has not been seen on the plains of Manchuria. Quarter, in the ordinary sense, has neither been asked nor given."

² Grant, *Memoirs*, p. 609.

³ Joubert appears to have similarly issued orders against firing on the British troops in their withdrawal from Spion-Kop in the last Anglo-Boer War. "This anti-military humanity of the Boer generals prevented Spion-Kop being another Austerlitz," says Professor Despagnet, *op. cit.*, p. 104.

⁴ *Times History*, Vol. II, p. 191.

⁵ It is open to men who wish to surrender to separate themselves from the mass of fugitives and hoist a white flag, which would certainly be recognised by a humane opponent. Then, the soldier's war right to quarter can be admitted without causing the victor to lose the fruits of his success—namely, the complete overthrow of his escaping enemy.

Willingness to surrender is usually indicated by the hoisting of a white flag, or some improvised substitute for it,¹ but there is no settled procedure in this matter. Some troops throw down their arms; others hold up their hands (such was the Boer practice). The Prussian appeal for mercy in 1870 was to raise the butt-end of the needle-gun; this the French considered insufficient and made them fall on their knees.² In the war of 1904 the Russians sometimes went to the length of embracing the enemy to whom they wished to surrender!³ There are so many diverse ways of indicating surrender that it seems desirable for one universal procedure to be settled by international agreement.⁴

Attention may here be conveniently drawn to the absence of any rule of war law, conventional or customary, forbidding a commander to sacrifice his men's lives for a legitimate military end, or, still less, an individual sacrificing himself for the sake of his cause. International Law has no concern with such a matter as this, which is one affecting only the troops and their commander, or the individual and his conscience. It is worth mentioning here only because of the prevalent idea that the Russian gunners broke the laws of war when they fired on the mingled British and Russian cavalry at Balaclava. In a famous passage Sir William Russell has told the story of what happened when the British Light Cavalry were coming "back from the valley of death."

With courage too great almost for credence, they were breaking their way through the columns which enveloped them, when there took place an act of atrocity without parallel in the modern warfare of civilised nations. The Russian gunners, when the storm of cavalry passed, returned to their guns. They saw their own cavalry mingled with the troopers who had just ridden over them, and, to the eternal disgrace of the Russian name, the miscreants poured a murderous volley of grape and canister on the mass of

¹ When General J. B. Gordon had "fought his corps to a frazzle," as he says himself, in the attempt to elude Grant's pursuits from Petersburg, and had no alternative but to surrender, he could not find anything to make a white flag of—there was not a single white shirt or handkerchief in his corps! Eventually "a rag of some sort was found." (*Reminiscences*, p. 439.)

² G. T. Robinson, *The Betrayal of Metz*, pp. 242, 244.

³ Ariga, *op. cit.* p. 102

⁴ *Ibid.* p. 102.

struggling men and horses, mingling friend and foe in one common ruin.¹

The same thing occurred in the unsuccessful attack of the French under General de Monet on the Malakoff, on 24th February, 1855, when the Russians again fired on the mingled combatants.² Whatever objections there are to the action of the Russians in these two cases, they are not objections based on war law. Often in war a commander has to sacrifice a body of his troops to save the remainder or to secure a greater advantage; as, for example, in a rear-guard action or in a feint attack which is meant to cloak the real assault. There is little difference in principle or practice between sending men to certain death under the enemy's guns, sacrificing them deliberately as pawns in the game of war, so that their comrades may, as it were, step over their bodies to victory, and doing what the Russian gunners did in the Crimea. There have been many occasions in war in which a commander has found it necessary to shell a position which has been captured by the enemy, and on which his own wounded still lie. When Colonel Benson's rear-guard was overwhelmed by Botha at Bakenlaagte on 30th October, 1901, the British wounded were left lying where they had fallen on Gun Hill; the British guns in the camp below were turned on the hill and the wounded were subjected to a rain of shrapnel.³ At 203 Metre Hill, long the citadel of a "king-of-the-castle-game," played in grim earnest, between Nogi's men and Stoessel's, "the dead and wounded were simply pounded to pieces by the concentrated fire of both the Russian and Japanese guns."⁴ Again, the artillery fire which smooths the way for an infantry attack is often kept up,

Troops
shelled by
their own
artillery.

¹ Sir W. H. Russell, *Crimea*, p. 232 (October 25, 1854). See Kinglake *Crimea*, Vol. V, p. 303; Nolan, *War against Russia*, Vol. I, p. 548. The latter writer states "not a Russian who subsequently fell into our hands, of any rank, ever blamed this assassin mode of warfare, but seemed highly to approve of the deed from admiration of the motive—the destruction of the greatest possible number of their enemies even by the deliberate murder of their own troops." Take away the question-begging epithets and predicates from this passage, and you have an entire justification of what the Russians did.

² Nolan, *op. cit.* Vol. II, p. 137.

³ *Times History*, Vol. V, p. 374.

⁴ Ashmead-Bartlett, *Port Arthur*, p. 330.

designedly, until it endangers the attacking troops. At the attack on Railway Hill, Tugela Heights,

Some of the Yorkshires were actually wounded by the guns, but by now the British soldiers had begun to realise that efficient artillery support to the last moment was well worth the chance of such an accident.¹

General Maurice states that troops nowadays are not satisfied in an advance unless shells are seen bursting just in front of them.² The danger to themselves is discounted by the moral encouragement afforded by the close artillery support. The most grandmotherly of generals would hardly hesitate to risk spraying his own infantry skirmishers with shrapnel if, by taking the risk, he could smother the enemy's resistance at the decisive moment of the assault. At the battle of Shaho (13th October, 1904), the Japanese and Russian lines were only about fifty yards apart before the final assault on Tall Hill, yet the artillery on both sides pounded the opposing lines with shrapnel. "Many a bullet," says Sir Ian Hamilton, "must be finding the wrong billet when the two targets are only fifty yards apart."³ Every great leader must, and does, sacrifice his men when occasion arises, and the Russian action to which Russell refers was but an extreme instance of a common incident of modern war. Individual self-sacrifice is equally unrestricted by any international war right. In the Russo-Japanese War it is said that a Japanese officer, seeing his men driven back during one of the assaults on a trench, bound himself round and round with hand-grenades, which were ignited by one of his men; then he hurled himself, a living bomb, into the trench, where the grenades did terrible execution, of course blowing him to pieces, incidentally.⁴ An even sublimer example of heroic self-sacrifice is that of the Confederates who manned the submersible torpedo-boats in Charleston Harbour in the Secession War. One of these submarines, carrying no reserve of air and consequently proving simply a coffin for her successive crews, was sent down, and raised again five times, in a vain effort to

Individual self-sacrifice equally unforbidden.

¹ *Times History*, Vol. V, p. 540.

² Maurice, *Official History*, Vol. II, p. 522.

³ Sir Ian Hamilton, *Scrap Book*, Vol. II, p. 252.

⁴ Ashmead Bartlett, *Port Arthur*, p. 237.

sink the Federal ironclad *Housatonic*. "On the sixth occasion she was manned by two army officers and five volunteers. These brave men, knowing that they were going to certain death, successfully performed their task and paid for their success with their lives." "Upon such sacrifices, the gods themselves throw incense." Of self-immolation, whether of a body of troops or of an individual, and whether of men acting under orders, or of men who have volunteered for the service, there are plenty of instances in modern war; and in no case has the legality of such a method of damaging the enemy been called in question.

Former rule as to extermination of garrison after obstinate defence.

Among the forbidden acts of war the Brussels project, as originally drafted, specifically mentioned

"The threat of extermination towards a garrison which obstinately defends a fortress."²

Dreadful scenes at Port Arthur in 1894.

The provision was omitted from the final project, in view of the general war rights secured to men who surrender. Formerly a garrison which refused to surrender when the counterscarp of the fortress was blown in was held to forfeit its war right to quarter.³ The latest instance of the actual massacre of a garrison in such circumstances is that of the slaughter of the Ismail garrison by the Russians in 1790.⁴ The massacre of Fort Pillow was an act of retaliation for the employment of negro-soldiers in the defence of the fort (*vide supra* pp. 67-69). The storming of Port Arthur in the Chino-Japanese War is also a case of retaliation. The Japanese soldiers found the mutilated remains of their tortured friends exposed on the gateway of the town, and revenged themselves by a five days' massacre of the Chinese army and population. After the first day's storm, "Thursday, Friday, Saturday and Sunday were spent by the soldiery in murder and pillage from dawn to dark, in mutilation, in every conceivable kind of nameless atrocity, until the town became a ghastly inferno, to be remembered with a fearsome

¹ Birkbeck Wood and Edmunds, *History of the War in the United States*, 1861-5, p. 493.

² Brussels, B.B., p. 164.

³ See Hall, *International Law*, p. 398; Westlake, *International Law*, Part II, p. 75

⁴ Hall, *loc. cit.*

shudder until one's dying day."¹ It was "the solitary but deplorable lapse into barbarity" of which the Japanese can be accused in war.²

Though there is no recent case of the extermination of a garrison because of its over-obstinate resistance, there are not wanting instances of the threat of extermination being used, and no doubt these instances were in the memory of the framers of the Brussels provision on the subject. When Forest appeared before Paducah, Tennessee, in March, 1864, he summoned the garrison in these words :

Extermination threatened on several occasions in Secession war.

If you surrender, you will be treated as prisoners of war ; but if I have to storm your works, you may expect no quarter.

He failed to capture the place, however, and the earnestness of his grim words was not put to the proof.³ In October of the same year, the Texan general, Hood, appeared before Resaca, and the following correspondence took place between him and the commandant, Colonel Weaver, who held the place for the Federals.

H.Q., Army of Tennessee, in the Field,
October 12, 1864.

To

The O.C., the U.S. Forces at Resaca, Ga.

Sir,

I demand the immediate and unconditional surrender of the post and garrison under your command, and, should this be acceded to, all white officers and soldiers will be paroled in a few days. If the place is carried by assault, no prisoners will be taken.

Most respectfully, etc.,

J. B. HOOD, *General*.

¹ Report of Special Correspondent of *Times*, quoted by F. E. Smith and N. W. Sibley, *op. cit.* pp. 72-3. See Holland, *Studies in International Law*, p. 119.

² Hall, *International Law*, pp. 400-1. Readers of Napier will remember the dreadful scenes which followed the stormings of Badajoz, Ciudad Rodrigo, and St. Sebastian, in the Peninsular War. But the massacres and excesses which marked the capture of these towns were not deliberately planned by the British commanders, whose culpability lay in failing to take precautions to keep their troops well in hand and under proper discipline in the enthusiasm and confusion of the capture, rather than in consciously acting on the inhuman rule which declared the lives of the garrison forfeit when resistance was obstinately prolonged. See Napier, Book XVI (Vol. IV), pp. 93, 123 ; Maxwell's *Wellington*, Vol. II, pp. 440, 466-7 ; Vol. III, p. 227.

³ Draper, *op. cit.* Vol. III, pp. 214-5.

Reply :

H.Q., 2nd Brigade, 3rd Divn., 15th Corps,
Resaca, Ga.

12 October, 1864.

To

Gen. J. B. Hood,

Your communication of this date just received. In reply, I have to state that I am somewhat surprised at the concluding paragraph, to the effect that, if the place is carried by assault, no prisoners will be taken. In my opinion, I can hold this post. If you want it, come and take it.

I am, General, etc.,

CLARK R. WEAVER, C.O.

Again in this case it cannot be told whether the threat of extermination was an empty one or not, for Hood did not attempt an assault at all.¹ Sherman himself was not above using Hood's letter quoted above to awe the Savannah garrison into surrendering, though, in this case, one may conclude, from a general study of Sherman's career, that he would never have executed the threat, had Hardee not evacuated the town but attempted an unsuccessful defence. With his summons to surrender Sherman sent a copy of Hood's letter to Weaver, "to be used for what it was worth," and at the same time warned Hardee that in the event of the garrison electing to stand a siege instead of capitulating, he would make little effort to restrain his army, "already burning to avenge the national wrong which they attach to Savannah." Hardee's dignified reply is noteworthy for its bearing, not on the question of quarter only, but on the general question of the admissibility of precedents drawn from the Civil War as evidence on points of war law. He said :

With respect to the threats conveyed in the closing paragraphs of your letter (of what may be expected in case your demand is not complied with), I have to say that I have hitherto conducted the military operations instructed to my discretion in strict accordance with the rules of civilised warfare, and I should deeply regret the adoption of any course by you which may force me to deviate from them in future.²

¹ Sherman, *Memoirs*, Vol. II, p. 155.

² Sherman, Vol. II, pp. 210-12; Bowman and Irwin, *Sherman and his Campaigns*, p. 295.

IV MEANS OF INJURING THE ENEMY 101

In the Franco-German War, there is one instance of a garrison being threatened with extermination, but not for the purpose of awing it into surrender, as in the cases mentioned above; it was rather a threat of retaliation for a suspected act of treachery. At the capitulation of Laon on 9th September, 1870, a terrible explosion took place as the French Mobile Guards were leaving the citadel and the Germans entering it, and many on both sides were killed. At first the act was thought to have been ordered by the Commandant, General d'Hame, and he was placed under arrest by the Prussians. Subsequent investigation showed, however, that he was innocent (he himself died of injuries received at the explosion) and that the author was an inspector of artillery who perished. When Toul capitulated a week later, the responsibility for the Laon explosion had not been fixed, and the Germans, fearing a repetition of the supposed treacherous act, inserted a clause in the convention of surrender to the effect that, if a similar "lamentable accident" should occur on the entry of the German troops, "the entire garrison shall be at the mercy of the Grand Duke of Mecklenburg" (the commander of the besiegers).¹ However, nothing of the kind occurred.

By an International Declaration, originally made at the Hague in 1899 and renewed in 1907,² all the civilised Powers have agreed

Instance in war of 1870-1.
Asphyxiating or noxious gases.

To abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.³

I can find no instance of the actual use in war of such a gas, but proposals have been made on several occasions to employ something of the kind. During the Crimean War, the aged Earl of Dundonald, the "skeely skipper," of two generations before, informed the House of Lords that he knew of a mortal gas which was capable of exterminating the population of an entire region, and he proposed that it should be tried against Sebastopol.⁴ The proposal does not appear to have been taken seriously. In the American Civil War, an inventive genius

¹ Hozier, *Franco-Prussian War*, Vol. II, pp. 43-4, 73; Cassell's *History*, Vol. I, pp. 172-3.

² Great Britain and the United States adhered only in 1907.

³ Hague, I B.B. p. 343.

⁴ De Martens, *op. cit.* p. 71.

suggested that Petersburg should be captured by firing into it shells containing a very powerful snuff, which would set the defenders sneezing violently and leave them an easy prey to the Union army.¹ Equally impracticable was the proposal of a French chemist in 1870 to use a preparation called fulminate of picrate of potash against the German invaders; he guaranteed that it would sweep the enemy's armies off the face of the earth, but, as a second string, he professed to know of another preparation which would asphyxiate any living creature upon whom it was projected. Nothing came of these suggestions.² The legitimacy of the British lyddite has been called in question by jurists, on the ground that its fumes may cause death by asphyxiation, but as that is not its *sole* end, it is not forbidden by the usages of war.³ Indeed, as M. Arthur Desjardins has pointed out,⁴ there is little appreciable difference between English lyddite, French melinite, and German roburite. During the siege of Ladysmith, General Joubert protested to Sir George White against the use of lyddite, but Professor Despagne, who is not chargeable with partiality for English views, remarks that the protest cannot be justified in the present state of the laws of war.⁵

The throwing of projectiles from balloons is forbidden by the following Declaration, made at the Hague Conference of 1899 for a period of five years (Great Britain and the United States of America being dissentients), and renewed in 1907 until "the close of the Third Peace Conference"—the next Conference.

The discharge of projectiles from balloons.

The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

This Declaration has been signed by the United States, Austria, Great Britain, Norway and Switzerland; it has not been accepted by Germany, Spain, France, Italy, Jāpan, Sweden. In this list I take account only of the more important nations. It

¹ General Horace Porter, *Campaigning with Grant*, p. 372.

² Cassell's *History*, Vol. I, p. 362.

³ Bonfils, *op. cit.* sec. 1069.

⁴ *Revue des Deux Mondes*, 1st March, 1900, p. 45.

⁵ Despagne, *op. cit.* p. 113.

has not, therefore, a universally binding force and cannot be said to be a "law of war," except as between the nations which have signed it. It was proposed at the last Hague Conference that the shelling or dynamiting of undefended towns or villages from air-ships or balloons should be specially prohibited. It was considered, however, that this point would be sufficiently covered by adding the words "by any means whatever" to Article XXV.

Although war law sanctions the killing of all enemy combatants, save such as have surrendered, or are wounded and cease to resist, or are specially protected by a flag of truce or by a passport or safe conduct, a usage is in the making by which armies refrain from killing each others' vedettes and sentries, when no further end, beyond the killing of the man or men immediately concerned, is gained by the act. In the Crimean War the English and Russian vedettes did not disturb one another,¹ and in the Secession War the similarity of race and language led to something more than mutual forbearance on the part of the belligerents' pickets. In Sherman's wonderful march from Chattanooga to Atlanta—the march which earned him his nickname of "Old Pothook" from the way in which he manœuvred Joseph Johnston out of successive positions—the pickets of the two armies were on the friendliest terms whenever they were not trying to kill one another in pitched battles. It was the same round Vicksburg; the men in the outer trenches would call out to one another that they "wanted to get out into fresh air," and the call was always heeded and firing stopped for a time. Whenever an order came to open fire, or the time had expired they would call, "Hello there, Johnny," or "Hello there, Yank," as the case might be—"get into your holes now, we are going to shoot!"² Along the Rapidan and the Rappahannock, too, the sentries fraternised and swapped newspapers and the tobacco of the south and the coffee of the north.³ Lee forbade the traffic and intercourse, which indeed no wise commander could countenance. There are obvious objections to allowing soldiers to fraternise with the enemy. The French code of military justice lays down that "a commander ought to limit his com-

War usage
in favour
of sparing
sentries
and
pickets.

¹ Kinglake, *Crimea*, Vol. VI, p. 83.

² Gordon, *Reminiscences*, p. 109.

³ *Ibid.* p. 110.

munications with the enemy to the minimum and tolerate none on the part of his men.”¹ But the sparing of the hostile pickets is a wise and humane rule. Sir George White discountenanced sniping at Ladysmith. The *Times* historian observes that sniping may have been justified in this last case as tending to keep up the garrison’s spirits;² but as two sides can take a hand at this game, and as a sentry cannot expect to play the marksman without being in turn the target as well, it is questionable if the killing of a few of the enemy’s sentries would be regarded by a wise general as worth the constant strain and nerve tension which this kind of pot-shooting would mean for his own men. At Plevna, Osman Pasha disapproved of such methods as cowardly and brutal, though the Circassians resorted to them at times.³

Sentry-stalking in the war of 1870-1.

The Franco-German War saw a retrogression in this matter of sentry-stalking. “Contrary to modern custom,” says Mr. Sutherland Edwards, “the outpost duty at Strasburg was a game of hide-and-seek, in which the forfeit of discovery was a bullet. The usual rule was to shoot at sight.”⁴ “During the siege of Paris,” says Mr. Archibald Forbes, “there was a miserably great amount of simple cold-blooded murder perpetrated on the foreposts. No other term than murder expresses the killing of a lone sentry by a pot-shot at long range. It was like shooting a partridge sitting.”⁵ The French *chassepot*, with its longer range, gave the French a great advantage over their opponents at this game of sentry-winging. There is no binding war law on the subject and the jurists are silent as to the right or wrong of the matter, but it is certain that humane commanders will, save in very exceptional circumstances, follow the rule laid down in the *American Instructions*, which forbids, ordinarily, the killing of “outposts, sentinels, or pickets” (Article 69).

Use of the enemy’s uniform or flag.

I have already dealt with some aspects of the war rights relating to flags of truce, and I shall handle the question later in Chapter VII. As regards the use of an enemy’s

¹ Bouffils, *op. cit.* sec. 1237.

² *Times History*, Vol. III, p. 162.

³ W. V. Herbert, *Defence of Plevna*, p. 237.

⁴ Sutherland Edwards, *Germans in France*, p. 195.

⁵ Forbes, *Memories and Studies of War and Peace*, p. 103.

uniform, insignia, and national flag, the jurists mention an old rule of war allowing such use up to the commencement of actual fighting.¹ Hall states that it is "perfectly legitimate to use the distinctive emblem of an enemy in order to escape from him or to draw his forces into action," but that soldiers wearing the enemy's uniform must put on some distinctive mark before they attack.² The quiddity of the rule is difficult to follow. When the disguise has done what it was intended to do, there is little virtue in discarding it. If it is improper to wear the enemy's uniform in a pitched battle, it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms. Nor can I understand the distinction which Professor Pillet draws between the use of the enemy's flag and that of his uniform and insignia. The latter he allows, the former he condemns, the flag being "the traditional sign which represents the nation," while "the uniform has not the same importance nor the same significance."³ It is quite incorrect to say that a uniform has not a very great importance and significance to-day—one has but to turn to the Brussels discussion on belligerent qualifications to see that this is so. The *American Instructions* show quite clearly that war usage, as understood by the author, condemns the use of the enemy's distinctive uniform, even before a battle, for paragraph 64 instructs troops who find it necessary to use uniforms captured from the enemy, to adopt "some striking mark or sign to distinguish the American soldier from the enemy." And a similar provision is to be found in the British official manual

¹ Hall, *International Law*, p. 537 ; Oppenheim, *International Law*, Vol. II, p. 165 ; Bluntschli, *op. cit.* sec. 565, who says that "it is not contrary to International Law to deceive the enemy by making use of his uniform, standard, or flag," but that they must not be used in battle "because enemies ought to fight loyally and not to make use of the mask of friendship to secure the victory." This is simply torturing common sense to find some ground for an illogical and unsustainable rule of war now obsolete. Dr. Lawrence (*International Law*, p. 445) says that the rule is "arbitrary" but "generally received" that "troops may be clothed in the uniform of the enemy in order to creep unrecognised or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assail." I question the existence, to-day, of the former part of such a rule, outside of the pages of jurists. Bonfils (*op. cit.* sec. 1074) condemns the use of the enemy's flag or uniform, absolutely, as an act of perfidy.

² Hall, *loc. cit.*

³ Pillet, *op. cit.* pp. 95 6.

(*Laws and Customs of War*, pp. 31-2). The *American Instructions* stigmatise as perfidy "the use of the enemy's national standard, flag, or other emblem of nationality for the purpose of deceiving the enemy in battle." The Hague *Règlement* has really left the matter undecided, for it refers to the *improper* use of the national flag, insignia, or uniform of the enemy. I think the Anglo-Boer War furnishes an excellent precedent for guidance in this matter, with which I shall deal after a hasty review of the practice in some prior wars. It is most probable that, under present practice, the assumption of an enemy's uniform or flag, even before a battle, would be regarded as a violation of the laws of war, unless the circumstances showed that there was no intent to deceive.

Wearing
of enemy's
uniform in
Secession
War;

There are very many instances in the Secession War of the Federal uniform being assumed by the Confederates, by reason of necessity and not as a disguise. From the first the Southerners were short of uniforms. The appearance of those captured at Shiloh, where the strong arm and brain of Albert Sidney Johnston were lost to the South, must have resembled that of Falstaff's gibbet brigade. "They had old carpets, new carpets, rag carpets, old bed-quilts, new bed-quilts, and ladies' quilts for blankets. They had slouch hats, children's hats, little girls' hats, but not one soldier had a soldier's cap on his head."¹ It is little wonder that even Stonewall Jackson, strict disciplinarian though he was, had to permit the practice of wearing the enemy's uniform when the supplies of butternut clothing—the famous Confederate grey—ran out.² The Confederates, like the Boers in 1901-2, depended largely for their supplies and clothing on the chance captures which they made, and the bad stuff which the Northern contractors furnished to the Union armies was a frequent subject of joking comment among the Secessionists. Perhaps the most useful result of Wheeler's raid across the Tennessee in October, 1863, was that he was enabled to clothe half his force in captured Federal uniforms.³ The pale blue overcoats of the Union troops were largely worn by the Confederates, who had no others in the

¹ Draper, *op. cit.* Vol. II, p. 166.

² Henderson, *Stonewall Jackson*, Vol. I, p. 221.

³ Villard, *Reminiscences*, Vol. I, p. 205.

later stages of the war.¹ Lee's troops were partially clad in Federal uniforms when they crossed the Potomac for the great struggle on the Antietam.² When Stonewall Jackson threw himself, as out of the sheer blue, on Pope's communications at Manassas Junction, where was stored the lavish wealth of supplies and stores which the North had gathered for its sons, the tattered Confederates "from piles of new clothing arrayed themselves in the blue uniforms of the Federals."³ It would be an interesting psychological study to examine how far the brilliant exploits and daring achievements of the Southerners were due to the very unromantic motive of a desire to replenish their wardrobes, and to assign the proper values, as propelling forces in action, to the desire for glory, patriotism, belief in a righteous cause on the one hand, and, on the other, to the simple fact that the Union men had trousers, boots and shirts and they (the Confederates) had not. There is no doubt that many a brave charge was made to the battle-cry of "I want that blanket," or "Yank, git out of them boots!" The Federals appear to have tacitly admitted that the appropriation of their uniform by the enemy was justified by the latter's circumstances. I shall have something to say in Chapter VI as to the assumption of the enemy's uniforms in this war for the purpose of disguise and deception.

In the Russo-Turkish War of 1877-8, wearing of the enemy's uniform was fairly common on both sides. The Turkish defenders of Plevna took Russian and Roumanian uniforms from the corpses: "many a Turkish greatcoat concealed a complete set of these."⁴ The Russians could not complain, for they did the same. When Gourko's men were shivering in the cold of the Balkans, they were glad to wear the Turkish cloaks, uniforms and boots which were captured at the dépôts at Kazanlik.⁵ Indeed, helping oneself from the enemy's dead is a feature of every war. A British Field-Marshal has admitted that he procured a pair of boots in this

in Russo-Turkish war;

¹ General J. B. Gordon, *Reminiscences*, p. 424.

² Henderson, *op. cit.* Vol. II, p. 205.

³ *Ibid.* p. 134, from G. H. Gordon's *Army of Virginia*.

⁴ W. V. Herbert, *The Defence of Plevna*, p. 338.

⁵ Colonel Epauchin, *Operations of General Gourko's Advance Guard* (Havelock's translation), pp. 131-2.

way after Inkerman.¹ But that was long before the baton in the knapsack, or the British officer's equivalent had materialised.

in Anglo-
Boer War.

In the later stages of the Boer War the practice of assuming British uniforms became very common among the Boers. After the action of Roodewal, De Wet's men were clothed entirely in khaki, only their wide felt hats indicating their nationality.² Every English prisoner was subjected to a process of disrobement which generally left the victim in an absurd if pitiable state of destitution. It is on record that one officer ran six miles in his shirt after an experience of this kind and, Pheidippides-like in several respects, reached a British column as the bearer of news of great moment and of an extremely unorthodox, almost Grecian, equipment.³ Lord Methuen himself came near experiencing the usual "uitschudden" (stripping). After his capture at Tweebosch, he was lying badly wounded in a tent, conversing with De la Rey, when a Boer appeared and "began, from the force of habit as it were, to remove the gaiter from Lord Methuen's unwounded leg. He was dragged off and ejected by De la Rey himself."⁴ Sheer necessity drove the Boers to assume their opponents' uniform, and it is impossible to blame them, seeing that, as De Wet himself points out, their destitution was caused by the action of the British troops themselves. Not only did the latter seize or burn the clothes which the burghers left at their farms, but they took the hides out of the tanning tubs and cut them to pieces.⁵ In the Pretoria Museum one may see a complete costume worn by a Boer during the war, which shows the straits to which the commandos were reduced: it is made of the hides of baboon, blesbok and tame buck, and the boots are riveted with carriage buttons, while the hat is made of ox-stomach. The British official view was that the wearing of British uniform by the Boers rendered the wearers liable to

¹ Sir Evelyn Wood, *From Midshipman to Field-Marshal*, Vol. I, p. 53. After the battle of S. Juan in 1898, Roosevelt's men had as covering only "what blankets, rain-coats and hammocks we took from the dead Spaniards" (*The Rough Riders*, p. 161).

² Philip Pienaar, *With Steyn and De Wet*, p. 107.

³ *Times History*, Vol. V, p. 289.

⁴ *Ibid.* p. 507.

⁵ De Wet, *Three Years War*, pp. 133, 288.

punishment, but, generally speaking, the practice was recognised as being inevitable, and no punitive measures were taken unless an intention to deceive was apparent.¹

In bad cases of wilful deception, Boers were sentenced to be shot for wearing our uniform, but Kitchener, as a general rule, took a lenient view of the offence. It must be borne in mind that the slouch hat, the one characteristic feature of the Boer garb and easily recognisable at great distances, had been adopted by the British authorities themselves.²

In the *Papers relating to Martial Law in South Africa*, records will be found of Boers being condemned to death or penal servitude for wearing British uniform,³ but in the vast majority of cases no punishment was inflicted. An instance of the deceptive and therefore punishable assumption of British dress is the incident of Tafel Kop, 20th December, 1901, where a detachment of Yeomanry and Irregular Horse was annihilated owing to the Boers, under Commandant Wessel Wessels drawing up in regular formation and manœuvring like British cavalry, with khaki-dressed skirmishers thrown out in front, and thus succeeding in capturing the hill before the others saw through the ruse.⁴ De la Rey's force which captured Lord Methuen in March, 1902, was almost entirely dressed in khaki, "which made it impossible," says Lord Kitchener in his despatch, "for our infantry to distinguish between our troops and the enemy,"⁵ but here the malicious intent was not so apparent as at Tafel Kop. The attitude of the British authorities in this matter appears to have been a very proper one; they looked behind the fact to the intent, behind the *actum* to the *mens*, and, while overlooking cases of assumption of British uniform which were due to real necessity, dealt severely with every case in which a design to deceive was

¹ The Secretary of State for War stated in the House of Commons, 18th March, 1902—"In accordance with the customs of war among civilised nations, Boers captured in British uniform are liable to be shot after court-martial. In certain cases Lord Kitchener has inflicted this penalty." (Wyman's *Army Debates*, session 1902, Vol. I, p. 1493.)

² *Times History*, Vol. V, p. 255.

³ See, e.g., pages 125, 155, 185 of the *Papers* referred to (Cd. 981 of 1902).

⁴ *Times History*, Vol. V, p. 425.

⁵ Wyman's *Army Debates*, loc. cit. p. 1289.

apparent. It is to be desired that future wars may see this sensible line adopted, instead of the stupid rule of the jurists, with its arbitrary distinction between the prelude to battle and the battle itself.¹

The wearing of civilian dress by soldiers.

Article XXIII (f) makes no mention of the wearing of civilian clothes by belligerent troops, as a disguise to further the execution of some hostile act. The point is covered by Article I of the *Règlement*, which requires the *organised* forces of a belligerent to wear some kind of uniform, and further by Article XXIII (b) in regard to all cases in which there is a treacherous attempt to kill or wound. A case bearing on the question arose in 1904. Two Japanese officers (Major Ishomo Jokoko and Captain Jersko Jokki, both of the General Staff) were captured, disguised as Chinamen, trying to dynamite a railway bridge in Manchuria in the rear of the Russian forces. They were condemned to death by court-martial and shot. Dr. Oppenheim, who is my authority for the incident, states that it was a case of "war treason,"² but it might equally well be regarded as a case of illegitimate belligerency under Article I. The Russians themselves appear to have worn Chinese clothing frequently. An impartial observer says that they did so solely because of the non-arrival of their uniform winter clothing before the cold weather set in, and that there was no attempt at disguise.³ But there is evidence that in some cases at least the local dress was assumed for purposes of scouting and skirmishing,⁴ and the Japanese Government lodged a complaint on the subject with the St. Petersburg authorities, who denied the truth of the report.⁵

The question of the abuse of the Red Cross flag or

¹ Had Britain followed the jurists' rule and shot every Boer who wore British uniform in battle, the military executions of the war would have been increased a hundred-fold.

² Oppenheim, *International Law*, Vol. II, p. 270.

³ *Reports of Military Observers attached to the Armies in Manchuria*, by *American Officers*, p. 144 (Lieutenant-Colonel Schuyler's report).

⁴ Kinkodo Company's *History*, pp. 777, 1054, 1201.

⁵ Ariga, *op. cit.* pp. 252-3. The fact that China was *neutral* does not affect the question; her neutrality, so far as the theatre of war was concerned, was a mere phrase, and is in any case immaterial to the point in question, which is that of a combatant assuming the character of a pacific, non-hostile, individual.

brassard will be dealt with in the chapter on the Geneva Convention.

The subject of Article XXIII (g) is one of the greatest difficulties in the whole of International Law.¹ It is best to approach the question by getting a perfectly clear understanding as to the war right of destruction and seizure of property, and to do so, one must hark forward to Article XLVI, which, with Article XXIII (g), forms the conventional war law on the subject. Article XLVI lays down that private property is to be respected; Article XXIII (g), that destruction and seizure of any property is illegal unless imperatively demanded by the necessities of war. The two Articles must be read together,² and so read, they implicitly admit a war right to destroy or seize any property, if the destruction or seizure is a pressing military necessity. The right extends to all property whatsoever, public or private, hostile or even neutral,³ unless the property is specially protected by some definite war law. The only property so safeguarded is the *matériel* of mobile sanitary formation under the Geneva Convention. Every other kind of property can be, and has been, destroyed in modern war. The only limitation on the right is that the destruction or seizure must have as its object the "weakening of the military forces of the enemy," that being the sole legitimate end of war.

¹ At the Hague Conference of 1899, a proposal was made to suppress Article XXIII (g) on the ground that a later Article declares that private property must be respected. It was, however, retained, because the "Chapter" of which it forms a part is designed to limit the effects of hostilities proper, whilst Article XLVI has reference rather to the case of occupation. (Hague I B.B. pp. 145-6.) A further argument in favour of retention of the sub-Article is that it refers to *all* property, public or private, while the later Article only mentions private property.

² Article XLIV is in the section of the *Règlement* which deals with occupation, but it was decided at the Hague Conference of 1899 that "the restrictions imposed on the liberty of action of the *occupant*, apply *a fortiori* to the *invader*, when there is as yet no 'occupation' in the sense of Article XLII." (Hague I B.B. p. 152.) See also Professor Holland's note to Article XLII in the British manual, p. 34.

³ In 1870, the German military authorities in Alsace seized six or seven hundred railway carriages of the Central Swiss Railway, and also a considerable quantity of Austrian rolling stock, for use in their operations. They retained them for some time. Furthermore, they seized and sank in the Seine six English vessels which happened to be moored there, the object of the destruction being to prevent French gun-boats coming up the river. As to both cases, see later, pp. 510-13, and Hall, *International Law*, p. 744.

Abuse of
the Red
Cross.

The war
right of
destruction
and
seizure.

Devastation pure and simple, as an end in itself, as a self-contained measure of war, is not sanctioned by war law. Permissible devastation presents itself invariably as a means to a military end, as a factor in a legitimate operation of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. To destroy with the intention of damaging the hostile Government's pocket is illegitimate. The perennial object-lesson in this matter is the destruction of the public buildings at Washington in 1814, when the British forces under Major-General Ross and Admiral Cockburn burnt the President's house, the Government Offices and all the archives, but, as if to put the finishing touch to their masterly illustration of "how not to do it," left undestroyed a great quantity of munitions of war in the Navy Yard and also an extensive cannon foundry.¹ Devastation as an operation of war *per se* may be said to be wholly obsolete. When the French devastated the Rhine Palatinate in 1689, in order to leave a bare desolation between the French border and the German foe, "all Europe," says Vattel, the first great scientific jurist, "resounded with invectives and reproaches."² Even in that age men felt that a belligerent had no war right to make a solitude and call it war. Were the practice revived to-day, the general outcry would cause the responsible belligerent a greater moral damage than the material advantage secured. It is only to some reactionary minds that devastation as a means of putting pressure on a nation has recommended itself in recent times. Sheridan, whose motto might have been *Va victis*, so ruthless and indiscriminate was his ideal of war, has left on record his opinion that to bring about the end of war a people ought to be reduced to poverty by the destruction of their means of livelihood.³ When a British cavalry column raided the south-western corner of the Orange Free State in December, 1900, and burnt down Commandant Lubbe's farm, *The Times* approved of the action on the ground that the destruction of houses and

¹ Hewson Clarke, *The History of the War from the establishment of Louis XVIII on the throne of France to the Bombardment of Algiers*, London, 1817, p. 80. See Hall, *International Law*, p. 533.

² Quoted Lawrence, *International Law*, p. 442.

³ Sheridan, *Memoirs*, Vol. 1, pp. 487 S.

farms was a loss which the Boers would appreciate and which they would regard as much more serious than the loss of many men in the field of battle. The same paper remarked that, when the enemy has little public property, the destruction of private property is a peculiarly efficacious method of war.¹ Bismarck, whose views on warfare were far more drastic than those of Moltke and the other military authorities of the German armies, declared in 1870 that "the more French people had to suffer, the more they would long for peace, whatever conditions we made."² It is fairly safe to say that no civilised Power would to-day act upon this principle.

The general rule which I have stated, that devastation must be part and parcel of some military design to overcome the hostile army, furnishes the criterion of the right or wrong of any given destruction or seizure. But, as in the case of most general rules, the application of it gives rise to doubts and difficulties in practice. The question at once presents itself—How close must the connection be between the act of devastation and the operation to war to which it is ancillary? And this question is closely followed by another, not less difficult—What constitutes an imperative necessity of war? There is no conception in International Law more elusive, protean, wholly unsatisfactory, than that of war necessity. One can only determine its nature and scope by examining the actual events of war; theory is of little help. The practice of Governments and commanders, and the verdict thereon of their opponents, of contemporary public opinion, and of history, are the only real evidence that we can get as to what the term connotes. I shall try to illustrate the general question of devastation (and seizure), and especially the two-fold difficulty to which I have referred, by examples from the more important wars of recent years.

No question can arise as to a commander's war right to seize or destroy his enemy's war *matériel* or the other things mentioned in the first paragraph of Article LIII (*i.e.* State property that may be used for military operations); likewise

¹ See Despagnet, *op. cit.* p. 227. *The Times* historian, however, wiser than his journalist colleague, remarks that Babington's action "cannot be regarded as warranted by military exigencies, and elicited a perfectly justifiable protest from the Boer leaders." (Vol. III, p. 118.)

² Busch, *Bismarck*, Vol. I, p. 196.

the things mentioned in the second paragraph of the same Article, but in the latter case subject to compensation being paid to the owners. The destruction or seizure of the food supplies, remounts, forage, and uniforms of the enemy's army is an obvious method of weakening his armed resistance. With the destruction of food supplies or clothing, or the seizing of horses, etc., which, though privately owned, are likely to be used by the enemy for his operations, I shall deal presently, and the whole subject of requisition and contributions will be separately handled in a later chapter. At present I am dealing more particularly with the case of seizure or destruction of property by an army which has the enemy still before it, and which has not established a definite condition of occupation in the sense of Article XLII; but my remarks are also applicable to the case of occupation, so far as the conditions precedent to justifiable destruction and seizure arise under occupation.

Property
generally
on or near
the field
of battle.

As to fixed or movable property, not being the war *matériel*, stores or supplies of the enemy's army, which may be destroyed or appropriated in all circumstances, it is clear that the situation of such property within the zone of immediate hostilities may justify its destruction for the purpose of attack or defence.¹ No commander will hesitate to level houses, vineyards, fences, anything, for a sufficient military reason, to give his men a clear field of fire, or to prevent the enemy using them as cover or as a mark by which to range his fire. To be squeamish about the rights of property in such a matter is to court disaster. Sir Henry Lawrence was strongly urged by his advisers to demolish the mosques surrounding the Residency at Lucknow; he refrained—"Spare the holy places," he said—and the very heaviest losses which the British garrison suffered during the siege were caused by the fire from the buildings he had spared.² "Institutions devoted to religion" are assimilated to private property by Article LVI of the *Règlement*, and a commander has an undoubted war right to destroy such build-

¹ The things that can be used for warlike purposes (see Article LIII) are of their very nature subject to seizure or destruction. All other property is primarily free from seizure or destruction but may lose its inviolability from the circumstances of its situation. The first kind is essentially destructible; the second only derivatively.

² Kaye's *Sepoy War*, Vol. III, pp. 439-40, 521.

ings if it is necessary for the defence of his command. To spare them may be high chivalry, but it is not war. And the same principles apply to the case of civil hospitals; it is no breach of war law for a commander to garrison or destroy any such buildings if imperious military necessity demands, but he should in such a case provide for the patients elsewhere. One is surprised to find an astute Boer commandant erring in somewhat the same way as Lawrence in the Mutiny. When General Buller attacked Bergendal Farm (near Belfast, Transvaal) on 27th August, 1900, the British artillerists were able to range their fire with destructive accuracy because the Boer commandant had omitted, for some sentimental reason, to cut down the trees on the farm.¹ In 1904, when the Japanese advance was threatening Liaoyang, the Russians wished to cut down the tall millet grass (kaoliang) around the town, in order to have a clear field of fire for 800 yards. The local Chinese demanded an exorbitant price as compensation for the crop, and the Russians haggled over this question, instead of doing at once what they were forced to do eventually, namely, take the matter into their own hands and cut the crop themselves. The result was that all kaoliang was not cut when the Japanese arrived and what was left standing gave them an invaluable cover in their attack.² The French burnt the fine forests round Paris in 1870 as a measure of defence,³ and one cannot conceive that they would have been more careful of hostile property than of their own. With such an act of national sacrifice as this war law has no concern, except to use it to show how unreasonable it would be to expect a belligerent to allow military considerations to be outweighed by respect for the private property and still less the public property of the hostile nation. At the Alma, the Russian commander, Prince

¹ *Times History*, Vol. IV, p. 452.

² *Reports of Military observers attached to the Armies in Manchuria, by American Officers* (General Staff, Washington, 1906), Part I, pp. 158, 209; T. Cowen, *Russo-Japanese War*, p. 337.

³ The forests, which were soaked from the prevailing rain, were fired by means of petroleum and gas-tar (Cassell's *History*, Vol. I, p. 148). See Hozier, *Franco-Prussian War*, Vol. II, pp. 33, 280, who says the demolition was not complete enough—a "huge belt of shelter" was left to save the Prussian army from being paralysed by the frost of the hard winter of 1870-1.

Mentschikoff, set fire to a village which lay in the path of the British 2nd Division, and by doing so blotted out the ground they were to operate on; "it was," says Kinglake, "the most sagacious of all the steps he took that day," for he had not enough troops to defend his line.¹ Had the village been a British one, the destruction would have been equally justified. In 1870, the Germans burnt the villages of Peltre, Basse Bevoie, La Maxe, and Magny near Metz to prevent their being used as shelter by the French in their sorties, as they were in the sorties of 22nd and 23rd September.² The action was the more irreproachable because the French had themselves made a *zone militaire*, from which everything was cleared away, round the fortress,³ and the Germans could hardly be expected to show a more sensitive regard for the rights of French property-owners than the French generals. A commander's first duty is to secure the success of his side by every means not forbidden by war law, and war law forbids only such destruction as is not warranted by imperative military necessity. The requirements of attack or defence may render the presence of property, no matter what its nature is, a "nuisance" (in the legal sense), and if one has a right to "abate a nuisance" by self-help in peace-time, one has a thousand-fold stronger right to do so in war, when life or death may hang on the sparing or destruction of a tree, a crop, a house, a village, or even a church. The *American Instructions* lay down (paragraph 18) that "military necessity . . . allows of all destruction of property," provided it be "indispensable for securing the ends of war" (paragraph 14). The British Manual is equally explicit:—

The "necessities of war" may obviously justify not only the seizure of private property but even the destruction of such property and the devastation of whole districts.⁴

The following "double rule" is laid down in the German *Kriegsbrauch im Landkriege* (p. 54):—

No damage must be done—not even the most trivial—which is not necessitated by military reasons. Every damage—the very

¹ Kinglake's *Crimea*, Vol. III, p. 54.

² *German Official History*, Part II, Vol. I, p. 185.

³ *Daily News War Correspondence*, p. 370.

⁴ *The Laws and Customs of War* (Holland), p. 30.

greatest—is justifiable, if war demands it or if it is a consequence of the proper carrying on of war.

Theory is in agreement with these principles.¹ War being what it is, it must deal roughly with property which is situated within the immediate sphere of its activities, and proprietors have no alternative but to grin and bear it when they see their cherished possessions damaged, not only unintentionally as an incident of battle, but deliberately and as a measure of tactical security. A rigid adherence to the principle of the inviolability of private property would, as Sir Travers Twiss points out, make war absolutely impossible;² it would checkmate every invading army at the first step. Sherman who, having been “jack-of-all-trades”³ (yet assuredly, despite the old saying, thorough master of one), was able to view in proper perspective, and without the purely professional soldier’s prejudices, the rights of the inhabitant as regards his property and the rights of the belligerent as regards his operations, has something illuminating to say on this as on many other points of war law. The *Bulletin* of Memphis had complained of the “waste” committed by the Federal troops. Yes, replied Sherman to the Editor, it is “waste,” but it is also war, for war is “waste”—waste of lives and waste of property. A command must commit waste in many ways—it must trample crops, take materials to construct fortifications, cut down fences, clear the ground of everything that would obstruct its fire or give cover to the enemy. Such damage is chargeable, not to the troops who cause it, but to the very nature of war, for “generally, war is destruction and nothing else.”⁴

So far I have dealt with the destruction or seizure of (1) army stores, supplies and *matériel*, and (2) all property which is situated in the immediate fighting area. The important question

Rail-roads, tele-graphs, etc.

¹ See Bonfils, *op. cit.* sec. 1195 and ff. who cites many authorities; Hall, *International Law*, p. 531 ff.; Lawrence, *International Law*, p. 440 ff.; Bluntschli, *op. cit.* sec. 652.

² Sir Travers Twiss, *War, Introduction*, quoted Bonfils, *op. cit.* sec. 1197.

³ Sherman had been in turn an officer in the regular army, a partner in a banking firm, an attorney-at-law, a superintendent of a military college, a president of a Railroad company, before the Civil War recalled him to the career of arms.

⁴ Sherman, *Memoirs*, Vol. I, pp. 276–8.

of railroads, telegraphs and similar means of communication must now be considered. Article LIII of the *Règlement* gives a belligerent power to seize such property, subject to the payment of compensation when it belongs to private individuals. Has he the right to destroy as well as to use? The answer is undoubtedly, yes.¹ An obvious and usual method of hampering an enemy's movements or cutting off his supplies and warlike material and stores, is the destruction of the railway line on which he depends. Both belligerents in the Secession War adopted this method of injuring the enemy over and over again, and the American railroads were not, and are not, State or Municipal but private property. Special bodies of Engineers were employed on both sides for the destruction and the repair of railroads. In Sherman's army the usual method of destruction was to make the rails red hot and then bend them round trees or twist them into corkscrew shape.² In the march to the sea rails were left to ornament the forest trees of Georgia. Expertness in the art of destroying was matched by expertness in the art of repairing. "We always," says Sherman, "kept distributed along the road duplicates of every bridge and culvert of any importance,"³ and so quickly was a damaged line put in working order again that the chagrined Confederates declared that "old Sherman carried a duplicate of every tunnel along," too!⁴ The German armies of 1870 contained five corps of railway engineers "whose particular duty it was to repair or destroy lines of railway as the necessity might arise."⁵ On the French side, companies of Volunteer engineers were organised to operate on the German lines of communications with picks, crowbars and powder petards and cases.⁶ The destruction of

¹ See the discussion in Pillet, *op. cit.* p. 264 ff.

² General Slocum gives a detailed description of the latter method in "Battles and Leaders" (*Century Magazine*, Vol. XXXIV, p. 930). See also Grant, *Memoirs*, p. 554.

³ *I.e.* in the line of communications from Chattanooga to Atlanta, Sherman, *Memoirs*, Vol. II, p. 151.

⁴ Sherman, *Memoirs*, Vol. II, p. 151. Sherman's repair-party under Colonel W. W. Wright was able to repair the eight miles of line from Big Shanty to Ackworth, though all the ties were burnt and the rails bent, in seven days.

⁵ Sutherland Edwards, *op. cit.* p. 226.

⁶ Hozier, *Franco-Prussian War*, Vol. II, p. 90.

railways in a hostile country is recognised in service training manuals as a proper operation of war. The German Field Service Regulations (*Feld Dienst Ordnung*) assigns the duty to railway corps or pioneers, when there is time to bring up such troops, otherwise to cavalry, by whom the disablement of a railway is "always to be attempted in the enemy's zone of operations."¹ Detailed instructions as to the various methods of demolition, whether by the use of explosives or otherwise, are given in the British *Manual of Military Engineering*.² For hasty demolition without explosives, a plan very similar to that employed by Sherman's engineers (that of heating and twisting the rails) is recommended.³ The same *Manual* describes methods of destroying rolling-stock with grim reticence:—

The rolling stock, if it cannot be removed to the rear, may be rendered unserviceable by burning, or trains may be run against each other at full speed on the same line, or they may be run over an embankment by turning a rail.⁴

Standardised methods of destroying telegraphs are also given.⁵ Where canals form an enemy's line of communication, they are similarly liable to destruction. Sheridan destroyed all the locks on the James River Canal in March 1865.⁶ My object in giving the above details, which may be thought unnecessary, will be apparent in a moment.

Though it is abundantly proved that the breaking of railways, telegraphs, etc., is a recognised method of war, some confusion of thought on the subject has led in some modern wars to an illogical practice which virtually amounts to denying the legitimacy of such destruction. This is the practice of holding the peaceable population of a district responsible for damage done to the railways, etc., therein, and punishing them even when the damage is done by their national troops. The practice has its origin, and, in proper limits, its justification, in the undoubted war right of an invader to punish the inhabitants of an occupied country for anything in the nature of a hostile act. As has already been said, such inhabitants, in return for

Historical practice as regards punishment for destroying railways, etc.

¹ German *Field Service Regulations* (English Official translation, 1900), pp. 141-2.

² *Manual of Military Engineering* (1905), sec. 232 ff.

³ *Ibid.* sec. 242.

⁴ *Ibid.* sec. 240.

⁵ *Ibid.* sec. 245 ff.

⁶ Draper, *op. cit.* Vol. III, p. 534; Sheridan, *Memoirs*, Vol. II, p. 123.

The case
of occu-
pied
districts.

the privilege of non-molestation, owe the invader the duty of quiescence, and if they damage his line of communication they forfeit their non-combatant privileges. Further, if they abet their national forces in injuring a railway or in any other act of war, or if they give them shelter from which to carry out such a design, or even if they fail to warn the occupying troops of the presence of raiders or of damage having been done to a line, when the duty of doing so has been enjoined upon them by proclamation, they lay themselves open to penalties. In any case of destruction of a railway or telegraph line in an occupied country, the very nature of things throws the onus of disproving their participation in the act on the local inhabitants. The breaking of railways or telegraphs is not an overt act, like opposing the invader in arms, but one which can be done secretly and without leaving traces of the perpetrators. The ease with which such damage can be done makes it necessary, for the security of the invader's communications, that the guilt of the inhabitants should be presumed at the outset in all cases of the kind. The presumption is very strong where the damaged line runs through an occupied territory, from which the enemy's troops have been driven to such a distance that there is no practical possibility of his raiding parties having effected the destruction. Jeb Stuart would no doubt have raided a territory studded with army corps to the square mile, blithely and as a morning's work, but, taking "occupation" in the sense of real and definite mastery of a territory, and not in the looser abandoned German interpretation (as to which later), it may reasonably be supposed that, when a line in an occupied district is wrecked, the inhabitants there have been indulging an improper taste for gun-cotton or crowbars. Punishment under war law differs from punishment under municipal law in that it is solely *deterrent* and that the necessities of war very often demand that it must be *vicarious*.¹ Mr. Sutherland Edwards says that one of the principles of war law is this: "For every offence punish some one; the guilty, if possible, but some one."² The application of this draconic principle to an occupied district is fair, upon the whole. Where a

¹ Ariga, *op. cit.* p. 327; Edwards, *op. cit.* p. 294.

² Edwards, *op. cit.* p. 285.

raid of the enemy's regular forces is so highly unlikely that it may reasonably be left out of consideration, there is nothing contrary to war law in punishing the civil inhabitants as a retaliation for an act of hostility which cannot have been the work of their country's recognised agents of war. The common-law rule of Great Britain that wilful damage to property may be compensated for by a general levy on the district is an analogous case of vicarious and general unmerited punishment. A review of these considerations will help one to understand the common practice of making the inhabitants of an occupied district responsible for the safety of the invader's communications. The German *Field Service Regulations* lay down (page 143) that—

It is a good plan to make each locality in the neighbourhood of a telegraph or telephone line responsible, under heavy penalties, for the preservation of a particular section of the line. German practice.

Similarly, in the Russo-Japanese War, the Japanese generals informed the inhabitants of the Manchurian villages by proclamation that they must take concerted action to prevent the destruction of telegraph lines or railways within the limits of each village.¹ All along the Trans-Manchurian railways, Marshal the Marquis Oyama ordered a proclamation to be posted up, which instructed the Chinese thus:—

The inhabitants of each village will assemble and decide on the measures to be taken to safeguard the line in the limit of their respective villages. Japanese practice.

If, as a result of negligence in surveillance, the line is found destroyed in the limits of a village, the inhabitants will be obliged to pay an indemnity equal to the total amount of the annual taxes paid by the village.²

¹ Ariga, *op. cit.* p. 388.

² *Ibid.* p. 391. Professor Ariga states (p. 388) that Russian proclamations (in the Chinese language) were found along the route of the 4th Japanese Army, warning the inhabitants that each time the telegraph line was cut the neighbouring district would be burnt, and the inhabitants massacred. Dr. Lawrence (*War and Neutrality in the Far East*, p. 288) remarks that the attitude of the Russian military authorities towards the population of Manchuria was unnecessarily severe and that their punishment for the breaking of railway and telegraph lines was a strange commentary on the Russian indignation at the much milder punishment of such offences in the Anglo-Boer War.

Professor Ariga remarks that this was no more than a menace, for in no case was the threatened penalty exacted.¹ The attitude of the Japanese authorities on this as on every point of war law, was sound and justifiable. Behind the broad front of their advancing armies, which had pressed back the Russians to the north, a complete and undisturbed condition of occupation had been established, and they were entitled to assume that any interruption in their line of communication could not have been effected without the help or connivance of the inhabitants. The second paragraph quoted above shows that it was intended to give the inhabitants an opportunity of rebutting the presumption of their complicity. This is a great advance of the practice of the Germans in 1870-1 and the British in 1900-2. In 1870-1, very severe treatment was meted out to the inhabitants of any district in which the German communications were interrupted. Huge fines were levied on communes in which a line was damaged by persons unknown.² When the railway bridge over the Moselle, between Nancy and Toul, was blown up in January, 1871, the town of Fontenoy was burnt down by order of the Governor of Lorraine, as a punishment for the destruction.³ Prominent members of the French civil population were forced to accompany the German trains as a kind of security against accidents on the railways.⁴ With this last mentioned point I shall deal more fully in the chapter on the sanction of war law. Had France, to the extent of the invasion, been occupied in the same way as Manchuria was occupied in 1904-5, the German method might perhaps be defended. But, for the most part, it was not really "occupied" at all. As I shall show later (see page 169) the German authorities held the opinion that occupation might be "constructive," which really amounted to its being not being occupation at all. There was hardly a part of the German line of communications which was not at the mercy of the raiding bands of the French armies. It is clearly unjust to punish inhabitants because their national troops carry

Undue
severity
of the
Germans
in 1870-1.

¹ Ariga, *op. cit.* p. 388. I find it stated, however, in the Kinkodo Company's *History*, p. 958, that a village near Hai-Cheng, in northern Manchuria, was punished for a breakage in the neighbouring railway line.

² Edwards, *op. cit.* pp. 76, 211.

³ Cassell's *History*, Vol. II, p. 167; Hall, *International Law*, p. 472.

⁴ Hozier, *Franco-Prussian War*, Vol. II, p. 90.

out a legitimate operation of war somewhere in the same district. It would be as logical to punish them because the enemy chose to fight a battle there. Of course, if they harbour raiding parties, or guide them, they become liable to penalties but the Germans gave them no chance of disproving their complicity or connivance. Punishment followed sharp and stern and as a matter of course, on any breakage of the line. The fact is that the German authorities appear to have confounded two things—the destruction of a line by the enemy's troops, which is perfectly legitimate war, and by the inhabitants, which is improper and punishable. Dr. Busch, who may be regarded as the apologist for the official German view, takes up the position that all interference with a railway line is wrongful. He says—

The German view an illogical one.

Finally, about the hostages, who are taken with our railway trains—they accompany us, not to interfere with the heroic deeds of the French, but to prevent malignant crimes. The railways carry other things besides soldiers, ammunition, and war materials. They are not a mere means of war, assailable, like others, by armed violence. Crowds of wounded, doctors, nurses for the sick, and other altogether peaceable persons are conveyed in them.¹

This is a condemnation of the act, *per se*, of breaking a railway; for though he goes on to ask "Is any peasant or free companion to be allowed to tear up the rails or lay stones across, so as at one blow to endanger the lives of hundreds of these people?"—the reasons adduced for not allowing them to do so apply with equal force to regular troops. Dr. Busch's words are, in fact, a condemnation of one half of the functions of the five German corps of Railway Engineers. It is unfortunately true that non-combatants may be injured as the result of an interruption in a railway line; but they may also be injured in a battle, or in a bombarded town; it is an inevitable incident of war. Professor Despagne very properly remarks that, given the strategic importance of communications by rail, one cannot question a belligerent's right to interrupt them by any means and to arrest the trains, or blame him if peaceful passengers are injured incidentally. If an enemy were allowed to shield his railways from destruction on the plea that attacks directed

Professor Despagne's view.

¹ Busch, *Bismarck*, Vol. III, pp. 121-2.

against the line or the trains might recoil on non-combatants, the presence of a few women or children in a military train, or in a train preceding a convoy, would suffice to ensure the free circulation of his troops and to paralyse the other belligerent's activity.¹

One finds the German view and practice in this matter revived in the Anglo-Boer war. Soon after the British occupation of Pretoria, Lord Roberts issued the following Proclamation:

No. 5 of 1900.

PROCLAMATION.

German
practice
followed
by Lord
Roberts.

Whereas small parties of raiders have recently been doing wanton damage to public property in the Orange River Colony and South African Republic by destroying railway bridges and culverts and cutting the telegraph wires, and whereas such damage cannot be done without the knowledge and connivance of the neighbouring inhabitants and the principal civil residents in the districts concerned,

Now, therefore, I, Frederick Sleigh, Baron Roberts of Kandahar and Waterford, K.P., G.C.B., G.C.S.I., G.C.I.E., V.C., Field Marshal, Commander-in-Chief of Her Majesty's Troops in South Africa, warn the said inhabitants and principal civil residents that, whenever public property is destroyed or injured in the manner specified above, they will be held responsible for aiding and abetting the offenders. The houses in the vicinity of the place where the damage is done will be burnt and the principal civil residents will be made prisoners of war.

ROBERTS, Field Marshal,
Commander-in-Chief, South Africa.²

Army Headquarters, South Africa,
Pretoria, 16th June, 1900.

In Proclamation No. 6 of 1900, dated 19th June, 1900, Lord Roberts further stated that "should any damage be done to any of the lines of railway or to any of the railway bridges, culverts, or buildings, or to any telegraph lines or other railway or public property in the Orange River Colony, or in that portion of the South African Republic for the time being within the

¹ Despagne, *La Guerre sud-africaine*, pp. 294-5.

² White paper, *Proclamations issued by F.M. Lord Roberts in South Africa* (Cd. 426, 1900), p. 10.

sphere of my military operations," certain detailed punishments should be inflicted; and also that:

As a further precautionary measure, the Director of Military Railways has been authorised to order that one or more of the residents, who will be selected by him from each district, shall from time to time accompany the trains while travelling through their district.¹

These Proclamations, taken in connection with Lord Roberts' statements in letters addressed to Commandant De Wet (3rd August, 1900) and to Commandant-General Botha (2nd September, 1900), amount to a condemnation of breaking railways and telegraphs as an operation of war. In the former letter, Lord Roberts stated that, railway and telegraph lines having been cut and trains wrecked, he had found it necessary to take steps to put an end to such acts, and had burned down the farmhouse at or near which such deeds were perpetrated; and he warned the Boer Commandant to cause a discontinuance of "*the misdeeds of the Burglers under your Honour's command*," and so render the farm-burning unnecessary.² In the second letter above referred to, he spoke of Boers, in small bodies, concealing themselves on farms near the lines of communication and damaging the railway, "*thus endangering the lives of passengers travelling by train who may or may not be combatants*."³ There is no evidence that anything was intended to be done, or was done, to discover whether any given destruction was aided and abetted by the local inhabitants or not. As in the Franco-German war, the mere fact of interruption in the line entailed punishment on the inhabitants and that too within a radius of ten miles. Anyone who knows anything of the South African

¹ White paper, *Proclamations issued by F.M. Lord Roberts in South Africa*, (Cd. 426, 1900), p. 11.

² *Correspondence as to Destruction of Property* (Cd. 582, 1901), p. 8. That interference with railways or telegraphs on the part of even combatant Boers was regarded as illegitimate by the British Military authorities, is, I think, proved by the reason which is given for the destruction of three hovels belonging to General Lemmer at Zamenkomst, Western Transvaal: "Letters were sent to fighting General Lemmer to warn him of the consequences if he touched the telegraph line. He cut it three times, so his three wretched hovels at Zamenkomst, where the break occurred, were burnt." (*Return of Buildings Burnt*, Cd. 524, 1901, p. 11.)

³ *Correspondence as to Destruction of Property*, p. 11.

veld will find it hard to credit the statement that the railways through it could not be injured "without the knowledge and connivance of the neighbouring inhabitants and the principal civil residents in the districts concerned." Not a mile of the British communications was not liable to be damaged by the mobile, ubiquitous combatant Boers, and the inhabitants would not necessarily be any the wiser.¹ If the knowledge and connivance of the inhabitants are not proved, then Proclamation No. 5 is a condemnation of railway and telegraph breaking perpetrated by the enemy's regular combatants ("small parties of raiders"), as an act contrary to the customs of war. The two letters from which extracts are quoted are further evidence that this was really the British official view; the letter to General Botha practically reproduces Dr. Busch's argument for treating all railway breaking as an illegitimate act. Yet British sappers are instructed in the art of demolishing permanent ways and destroying trains; and as to telegraph breaking, the *Manual of Military Engineering* expressly contemplates it as a necessary measure of warfare in exactly similar circumstances to those in which the Boers had recourse to the act in 1900-2. Section 246 of the *Manual* says:

It is assumed that the line to be destroyed lies in a country occupied by the enemy, to which access has been obtained for a short time by a raid.

As has been stated, the justification for punishing inhabitants for interruptions of a line of communication is that the ease and secrecy with which such interruptions can be effected force an invader, in self-defence, to assume *prima facie* that the inhabitants have been guilty either as principals or accomplices. The words of Proclamation No. 5, and of the letters, show that the local inhabitants were not punished as *principals*; the circumstances of the war and of the country rebut the

¹ The very house in which I am at present writing this book was one of those threatened with destruction in the event of the railway line near Pretoria being broken. The owner—my present landlord and a prominent Boer citizen—had probably as much chance to protect the line as I had then, in England, for the house is well over a mile from the railway and there are streets of houses between. (This note was written at Beatrix St., Pretoria. —J. M. S.)

presumption of their having been *accomplices*. The only possible inference is that train-wrecking is wrong *per se*. Yet were this the settled opinion of the British Military authorities, not only would the peace-time training of Royal Engineers in railway demolition be either very useless or very reprehensible, but it would have been gross injustice to have let notorious train-wreckers like Jack Hindon and Breydenbach go unpunished when captured, after punishing non-combatant Boers for the (assumed) illegitimate acts of these men and their like. The position is, indeed, hopelessly illogical, and it is much to be desired that some future Hague Conference may make some definite pronouncement as to the legality of wrecking railways and telegraphs and the punishment of the civil population of an invaded or occupied territory therefor.

Though railway breaking is a legitimate act of warfare, designedly to wreck a hospital train or a train which is known to be conveying peaceable inhabitants would not be legitimate for it would lack the essential requirement of being intended to weaken the enemy's military forces. But, generally speaking, railroads being to-day an all important means of warfare such design would have to be clearly proved against a belligerent to condemn him for exercising his broad war right to interrupt his enemy's communications. It is a very sad but inevitable consequence of a lawful act that it may endanger or kill persons who are strangers to hostilities. The suggestion of Professor Pillet, that interruptions in a line should be indicated by some flag or other conventional sign, to be sanctioned by international agreement, would have the desirable effect of preventing accidents to peaceable passengers.¹ But there are military objections to the suggestion; a belligerent has a war right, not only to stop a train, but to blow it sky high, if it carries fighting troops or war *matériel* or supplies, and this war right he will hardly forgo for humanitarian reasons. The strategic use of railways is so important that they must be regarded, in a country where active hostilities are going on, as a specific means of warfare, and only secondarily as fulfilling the ordinary functions of railways in peace-time. As I have said

Railway
wrecking
quite
legiti-
mate.

¹ Pillet, *op. cit.* p. 266.

before, non-combatants must travel by train at their risk when there is war in the land, and the only practicable method of ensuring their safety appears to be the sending ahead of a herald-engine to test the line.

“Fictitious destruction” cannot be recognised.

Buzzati’s suggestion.

Stein’s suggestion.

Destruction of military buildings.

Another suggestion of Professor Pillet’s seems quite impracticable and Utopian. He suggests that belligerents should undertake to regard a purely fictitious destruction of a railroad as equal to an actual destruction.¹ The idea is borrowed from the practice in manœuvres of marking a certain bridge as destroyed or a certain railway as demolished, the opposing side being bound in honour, on due notification, to abstain from using the bridge or railway. The objection to the proposal is the same as Professor Pillet himself makes to M. Buzzati’s proposal for the neutralisation of all international railway lines and the formation of a second parallel line for strategic purposes.² A belligerent would not respect the nominally-wrecked or neutralised line, were it to his great advantage to make use of it. Yet another suggestion for the protection of railways in war time is that of M. Stein, which would charge neutral railway administrations with the commercial exploitations of a belligerent’s railways.³ The Institute of International Law has considered and rejected this last proposal, which is open to the objection that it would create an impossible position for the neutrals working the lines (even supposing that their neutrality was recognised at all) in actual practice and lead inevitably to endless friction between the various Governments concerned.

War *matériel* and army supplies generally; property situated on the anticipated field of battle or in the zone of actual fighting; railways, telegraphs, etc., which are used by the enemy for his operations; all these are, as I hope I have proved, subject to destruction. I now come to a class of property which has a less immediate connection with active warlike operations; such as barracks, military storehouses, factories, and *depôts*, iron foundries and railway workshops which may be used to supply the enemy’s army. Barracks would evidently be liable to destruction on the ground that depriving an army of its shelter is a means of weakening its fighting efficiency. And

¹ Pillet, *op. cit.* pp. 266-7.

² *Ibid.* pp. 266-7.

³ *Ibid.* pp. 266-7.

private houses used as a shelter by the enemy's troops are similarly liable, not as a punishment inflicted upon the owners but as a means of preventing their further use by the enemy.¹ A village near Sebastopol (Tchorgoun) was burnt by the French with this object; it had practically been used as cantonments by the Russians.² The destruction of the villages around Metz, to which I have already referred (see p. 116, *supra*) is another instance of the same kind, though it may also be regarded as a tactical measure. As to storehouses and dépôts, their destruction would ordinarily appear to be legitimate only if it were a necessary incident of the destruction of the military stores they contained. The shelling of a commercial city because it will not give up the government stores it contains is an extreme and very doubtful exercise of a commander's war right of destruction. In the Crimean war the city of Odessa was spared by the English fleet because it would have been impossible to destroy the army stores it contained without endangering the whole city.³ Yet the commercial city of Genitschi was shelled and terribly damaged because it would not surrender the government stores. So too, was Taganrog.⁴ If, as *The Times* said at the time, it would have been regarded as a barbarous outrage throughout Europe to have destroyed the commercial city of Odessa, "on the pretext that its stores supplied provisions to the Russian army,"⁵ it is difficult to see how the shelling of the other towns can be approved. At Genitschi a great amount of private property was destroyed; at Taganrog, the town itself was set on fire by the shells, many non-combatants, including women and children, are said to have been killed, and the famous gardens were to a large extent destroyed.⁶ Seeing that Admiral Dundas dissuaded his French colleague, Admiral Penaud, from bombarding Helsingfors because injury would be inflicted upon the inhabitants of the

Destruction of cities containing war stores.

¹ In an *occupied* district, the owners *would* be liable to punishment, as harbouring the enemy amounts to an act hostile to the occupying belligerent. In the *Return of Buildings Burnt* in South Africa, June, 1900, to January, 1901 (Cd. 524), *passim*, one finds a very great number of cases in which farms were burnt because the owners harboured the Boers on commando.

² Russell, *Crimea*, p. 296.

³ Nolan's *War Against Russia*, Vol. II, p. 612.

⁴ *Ibid.* pp. 340-5.

⁵ *Ibid.* p. 612.

⁶ *Ibid.* pp. 340-5.

town and the beautiful Cathedral might be damaged,¹ the principle on which the allied navies destroyed, or refrained from destroying, buildings which contained government stores, is exceedingly hard to follow. There is an inconsequence about their actions which stamps the shelling of Genitschi and Taganrog as an unnecessary and therefore dubious operation of war. When the Confederate General Van Dorn captured Holly Springs, the grand depôt for Sherman's advance against Vicksburg, 20th December, 1862, he burnt the immense store-houses filled with supplies and clothing and commissary stores, and also the court-house and public buildings and large warehouses, which were crammed ceiling-high with medical and ordnance stores. "The explosion of one of the buildings, in which was stored one hundred barrels of powder, knocked down nearly all the houses on the south side of the square," and over two million dollars' worth of damage was done.² Van Dorn's action was more justifiable than the Crimean precedents in that he was pressed for time, with Grant's cavalry moving against him; had he not destroyed the munitions and supplies in the way he did, he might not have been able to destroy them at all.³ The Secession War is lamentably rich in instances of the burning of inhabited cities by the belligerents. Richmond, Columbia, Atlanta and Chambersburg were all burnt. On whom the responsibility for the burning of the first two should rest is an open question.⁴ The destruction of Atlanta by Sherman

¹ Nolan, *op. cit.* p. 400. I cannot agree with Professor Holland's general statement that "In the Crimea War our cruisers were careful to abstain from doing further damage than was involved in the confiscation or destruction of stores and arms and provisions." (*Studies in International Law*, p. 98.) In addition to the instances of Genitschi and Taganrog, see Russell, *Crimea*, p. 450, as to the plundering of Ambalaki, and Nolan, *op. cit.* Vol. II, pp. 396-7, as to the destruction of Fredericksham and Krotka.

² Draper, *op. cit.* Vol. II, p. 320.

³ As to the capture of Holly Springs, see Grant, *Memoirs*, pp. 256-7.

⁴ As to Richmond, General Fitzhugh Lee (nephew and cavalry commander of R. E. Lee) states that the Confederate commander at Richmond, Ewell (the brilliant Indian fighter, vegetarian, hypochondriac, magnificent horseman in spite of the handicap of a wooden leg, who fought for the Stars and Bars from the first Bull Run to Sailor's Creek), had made arrangements to burn the tobacco there whenever the evacuation of the city should render that necessary to prevent it falling into the hands of the enemy. After the departure of the southern troops the fire got beyond control. (*General Lee of the Confederate Army*, p. 381.) See Draper, *op. cit.* Vol. III, p. 517; Grant, *Memoirs*,

was deliberate. He could not spare a garrison for it, as he required his full force for his march to the sea, and he could not afford to leave it, a fortified city, to be seized again by Hood, who lay in his rear, ready to pounce upon it the moment it was evacuated by the Federals. All the inhabitants had been removed from the city—I shall say more as to this in a later chapter—and it had been turned into a fortress or *place d'armes*.¹ The destruction of such a place is justified by the same military necessity which justifies the destruction of war *matériel*. A commander has an undoubted right to destroy such places if he cannot hold them and if they would otherwise be used by the enemy. The burning of Chambersburg, in Pennsylvania, by the Secession General Jubal Early was a very different matter. The city was defenceless and undefended, and Early's sole reason for the burning was the refusal of his demand for a ransom of 600,000 dollars.² Three thousand non-combatants were left without shelter or food.³ The city was not specialised for war, like Atlanta, and Early's act was very properly disapproved by General Lee, to whom it proved a great shock.⁴

To destroy government property simply as a means of inflicting monetary loss on the enemy is clearly improper, as not

p. 614. As to Columbia, General Wade Hampton (Confederate) charges Sherman with having burnt it. (*Century Magazine*, "Battles and Leaders," Vol. XXXIV, p. 941.) Sherman charges Wade Hampton with the responsibility and states specifically that the destruction was not deliberately planned by the Federals. "It was accidental, and in my judgment began with the cotton which General Hampton's men had set fire to on leaving the city (whether by his orders or not is immaterial), which fire was partially subdued early in the day by our men, but, when night came, the high wind fanned it again into full blaze, carried it against the frame-houses, which caught like tinder, and soon spread beyond our control." (*Memoirs*, Vol. II, pp. 286-7.) Grant appears undecided as to the matter (*Memoirs*, p. 587).

¹ Grant, *Memoirs*, p. 552; Draper, *op. cit.* Vol. III, p. 320; Sherman, *Memoirs*, Vol. II, pp. 111-29; Wood and Edmunds, *History of the War in the United States*, p. 403.

² Wood and Edmunds, *op. cit.* p. 421. Draper, *op. cit.* Vol. III, p. 408. The excuse that it was burnt in retaliation for Hunter's devastation of the Shenandoah Valley (see H. A. White, *R. E. Lee and the Southern Confederacy*, p. 408) appears to have been put forward subsequently as an attempt to justify Early.

³ Sheridan, *Memoirs*, Vol. I, p. 460; Grant, *Memoirs*, pp. 527-8.

⁴ H. A. White, *op. cit.* p. 408; General J. B. Gordon's *Reminiscences*, p. 305.

Illegitimate destruction of Government property.

being demanded by the imperative necessities of war. The destruction of the Washington buildings in 1814 has already been mentioned. The sacking of Kertch in 1855 was equally unnecessary and shameful. A building there which had originally been a Greek temple but had latterly been used as a museum, and which contained priceless relics of the ancient civilisation of the Bosphorus, was completely destroyed with all its contents. "Not a single bit of anything," says Sir William Russell, "that could be broken or burnt any smaller had been exempt from reduction by hammer or fire." On the white panel of the door some unknown Frenchman or Russian traced in pencil an appeal to the allies "not to make war on history. If you have the pretension of being civilised nations, do not make war like barbarians." Some of the finest houses in the town, including that of the Governor, were similarly destroyed.¹ Flagrant cases of the destruction of property without any military necessity occurred in the Secession War. The Federal General Hunter destroyed the Virginia Military Institute at Lexington and the separate houses of the Professors.² "It will be difficult," says General J. B. Gordon, "to find any rule of civilised warfare or any plea of necessity which could justify General Hunter in the burning of these buildings."³ The destruction of the Strasburg library in 1870 was not deliberate, being an incident of the bombardment of the city; with this I shall deal again later.

Destruction of factories, foundries, and stores.

The war right to destroy war material and army supplies and stores generally must logically carry with it the right to seize or destroy factories and foundries, which would, if not held or rendered useless, continue to supply the enemy with the means of carrying on his war. Were England invaded, it is very certain that the Ordnance Factories at Woolwich and the Small Arms Factory at Enfield would either be held by the enemy for his own purposes, or else wrecked and rendered useless; and the same fate would befall such works as those of Armstrong Whitworth, or Vickers-Maxim, whose shareholders would, however, have a claim to compensation at the end of the war. Railway workshops and foundries, too, would be liable to

¹ Russell, *Crimea*, pp. 459-60.

² Captain R. E. Lee, *Recollection and Letters of General R. E. Lee*, p. 234; H. A. White, *R. E. Lee*, p. 437.

³ General J. B. Gordon, *Reminiscences*, p. 302.

destruction for analogous reasons. Under Grant's orders, Sherman destroyed Jackson, Mississippi, "as a railroad centre and manufacturing city of military supplies."¹ The arsenal, a foundry, and a cotton factory belonging to the Messrs. Green, which, when captured, was weaving tent cloth marked "C.S.A." (Confederate States Army), were burnt.² When Columbia surrendered in February 1865, Sherman gave General O. O. Howard written orders to destroy absolutely all arsenals and public depôts and machinery useful in war to the enemy, but to spare all dwellings, colleges, schools, asylums, and harmless private property.³ In the Crimean War, the allies blew up an iron foundry, storehouses, and grain magazines at Kertch.⁴ Sheridan burnt the mills and granaries in the Shenandoah Valley. In his report he said :

I have destroyed over 2000 barns filled with wheat, and hay, and farming implements, over 70 mills filled with flour and wheat ; I have driven in front of the army over 4000 head of stock, have killed and issued to the troops not less than 3000 sheep. A large number of horses has also been obtained.⁵

The Shenandoah devastation justified.

A brilliant American historian, by no means partial to the Confederate cause, has condemned the burning of the mills and farming implements in the Valley, "for that was to inflict vengeance upon the country for many years to come."⁶ But the propriety of the devastation depends on factors other than those mentioned by Swinton. The Valley—a veritable Old-Testament Valley, standing so thick with corn that it seemed to laugh and sing⁷—had long furnished supplies to the Secessionist armies from the surplusage of its crops. Since the early days of the war, when Stonewall Jackson manœuvred the five senses out of as many Union Generals there⁸ and made the name of the Valley famous for ever in war, its configuration and fertility had rendered it a continual source of menace to Washington, lying as it did in the most direct path of advance

¹ Grant, *Memoirs*, p. 298.

² Grant, *loc. cit.* ; Sherman, *Memoirs*, Vol. I, pp. 321-2.

³ Draper, *op. cit.* Vol. III, p. 549.

⁴ Russell, *Crimea*, p. 467.

⁵ Draper, *op. cit.* Vol. III, p. 411.

⁶ Swinton, *Campaigns of the Army of the Potomac*, p. 560.

⁷ As to the fertility of the Valley before 1864, see Gordon, *Reminiscences*, p. 374.

⁸ Banks, Shields, Milroy, Frémont, and McDowell.

towards the Federal capital and holding out a promise of ample food supplies for the southern troops in their raids.¹ It was, in fact, a military storehouse of supplies for the Secessionists, and if the overcoming of the hostile forces demanded that its granaries and mills should be burnt and its crops destroyed, the action which Grant and Sheridan approved must be judged consonant to the usages of war. It is this consideration—the crippling of Lee's army—which justifies the devastation and not, as some writers have thought, the fact that its inhabitants were bitterly hostile to the Union Government,² or that the devastation caused widespread desertion in Lee's army (largely recruited from the Shenandoah) because "the duty which a man owed to his starving family proved in many cases stronger even than his patriotism."³ That the two latter motives were not those which led the Federal authorities to order the devastation is amply proved by Grant's and Sheridan's instructions. The orders on the subject which Grant gave to Hunter and which Hunter turned over to his successor, Sheridan, were as follows :

Grant's
orders as
to the
Shenandoah.

Headquarters in the Field,
Monocacy Bridge, Md.,
August 5, 1864.

. . . In pushing up the Shenandoah Valley, as it is expected you will have to go first or last, it is desirable that nothing should be left to invite the enemy to return. Take all provisions, forage, and stock wanted for the use of your command. Such as cannot be consumed, destroy. It is not desirable that the buildings should be destroyed—they should rather be protected, but the people should be informed that so long as an army can subsist among them, recurrences of these raids must be expected, and we are determined to stop them at all hazards . . .

Very respectfully,
U. S. GRANT, Lt. Gen.⁴

¹ The Valley was of great importance to the Confederates as a line of invasion, but of practically none to the Federals, for it lay south-west to north-east, and so would lead away from Richmond (Wood and Edmunds, *op. cit.* p. 425, from "Battles and Leaders").

² Draper, *op. cit.* Vol. III, p. 411.

³ Wood and Edmunds, *op. cit.* p. 441. On the general question of the destruction of an enemy's food supplies, see also the quotations from General Maurice and General Halleck on p. 196, *infra*.

⁴ Sheridan, *Memoirs*, Vol. I, pp. 464-5.

Again, on 26th August 1864, Grant wrote to Sheridan, from City Point:

Do all the damage to railroads and crops you can. Carry off stock of all descriptions and negroes, so as to prevent further planting. If the war is to last another year, we want the Shenandoah Valley to remain a barren waste.¹

Sheridan instructed his cavalry commander, Brigadier-General A. T. A. Torbert, that "officers in charge of this delicate but necessary duty [the devastation] must inform the people that the object is to make this valley untenable for the raiding parties of the rebel army."² When Sheridan had finished with the valley, "a crow flying across it would have had to carry its own rations."³ So thoroughly did he perform his task that one is inclined to credit him with a special aptitude for such work inherited from some Cavan ancestor who served long ago with "Morrogh of the Burnings."

Sherman's devastation of Georgia and the Carolinas is justifiable on the same principles as Sheridan's devastation of the Shenandoah. His destruction of mills, granaries, and crops paralysed Lee's army. That army "lived for months on less than one-third rations. It was demoralised, not by the enemy in its front, but by the enemy in Georgia and the Carolinas."⁴ Horses, cattle, waggons, sheep, hogs, turkeys, etc., were seized by Sherman's troops. As to horses, he ordered great numbers to be shot "because of the demoralising effect on our infantry

Sheridan's orders.

Devastation of Georgia and the Carolinas.

¹ Sheridan, *Memoirs*, Vol. I, p. 486.

² *Ibid.* p. 485.

³ Fitzhugh Lee, *op. cit.* p. 353. He ascribes the phrase to Sheridan.

⁴ Words of Colonel Archer Anderson, at the unveiling of the Lee Monument in Richmond, Va., 29th May, 1890 (Captain R. E. Lee, *op. cit.* p. 148). H. A. White in his *R. E. Lee and the Southern Confederacy*, pp. 334-5, tells a good tale to illustrate the condition of the mess commissariat in Lee's Army towards the close of the struggle. "It is stated that some officers once came to dine in General Lee's tent. The fare set before them was only a plate of boiled cabbage; in the centre of the dish rested a diminutive slice of bacon. With knife well poised above this morsel, General Lee invited each guest in turn to receive a portion. The meat remained on the plate untouched; hunger was appeased with cabbage. On the following day, General Lee called again for the bit of swine-flesh, but his coloured servant, with many bows, gave the information that the bacon had been borrowed to grace the official board the day before, and had been already returned to the owner."

Devastation of the Boer Republics.

of having too many men mounted.”¹ The “broad swathe” which Sherman cut through the southern States was as much a blow at the efficiency of the Confederate forces as if he had captured and burnt their commissary store depôts or seized their remounts. A somewhat similar condition of things existed in the Transvaal in 1900–2. The Boers, like the Secessionists, had no regular military supply depôts and depended for their food on the mills, granaries, and farms scattered through the country. Before the necessities of war respect for private property had to go to the wall. Pietersburg in the northern Transvaal was the last regular source of supplies the Boers had. When Plumer captured it, in the spring of 1901, he destroyed four flour mills, a repairing shop, and the plants of two newspapers.² General Blood’s operations against Ben Viljoen about the same time resulted in the burning of many mills and granaries.³ The policy of devastation had been resolved upon before Lord Roberts relinquished the chief command to Lord Kitchener towards the end of 1900,⁴ but the latter carried it out with a systematic thoroughness that has seemed like barbarity to some but was amply warranted by the peculiar nature of the war. In January, 1901, Kitchener issued instructions to the columns to clear the country of supplies, horses, cattle, crops, transport vehicles, and non-combatant families. The latter were despatched to the Concentration Camps. “Supplies, waggons, and standing crops, if they could not be used, were to be burnt. Bakeries and mills were to be destroyed.”⁵ In his memorandum of 21st December, 1900, to his generals, Lord Kitchener remarked that the policy of removing the women and children from the farms had been prompted by the desire, not only to protect them, but to prevent the combatant Boers finding a source of supply in the farms. It was, he said, “the only effective method of limiting

¹ Sherman, *Memoirs*, Vol. II, p. 209.

² *Times History*, Vol. V, pp. 196, 203.

³ *Ibid.* p. 215.

⁴ Already in August, 1900, Lord Roberts had issued instructions to General Officers Commanding Columns in the Orange River Colony and Transvaal, in which he said: “Whilst giving protection to loyal inhabitants in his district, the General Officer Commanding will see that the country is so denuded of forage and supplies that no means of subsistence is left to any commando attempting to make incursions therein.” (*Times History*, Vol. IV, p. 488.)

⁵ *Ibid.* Vol. V, p. 162.

the endurance of the guerillas, as the men and women left on farms, if disloyal, willingly supplied the Burghers, if loyal, dare not refuse to do so.”¹ In the official *Return of Buildings Burnt* one may find the record of the destruction of farms in the two Boer Republics. Mostly the “reason for destruction” is given as “laying waste country used as base by enemy”: in some cases it is specially stated also that the house had been used by the combatant Boers, either as a shelter or as a stronghold. “Orders to lay waste the Doornberg district” accounts for a considerable number of farms burnt in September, 1900. Two houses north of Pretoria were destroyed, respectively, on account of “baking for and generally providing for parties of the enemy” and being “suspected on good information of harbouring and feeding Boers.”² The policy of devastation was justified by its results. The Boer delegates who met at Vereeniging on 15th May, 1902, to consider the question of surrender, recognised that the want of cattle and grain in various districts—especially Fauresmith, Bethulie, Hoopstad, Kroonstad, and Heilbron—made the continuation of the struggle an impossibility. Ten districts in the Transvaal were declared “unable to fight any more.” General Botha remarked, “The time is coming when we shall be compelled to say, ‘Hunger drives me to surrender,’” and General de la Rey added that starvation would compel some parts of the country to give up the struggle.³ Towards the end of the war, much of the Eastern Transvaal—once a land of plenty—was a “blackened desert.” “Not a beast, not a field of standing corn, not a native was left. Some trampled mealie fields, offering a niggardly harvest to very careful gleaners, were the only signs of life.”⁴ Even the burning of the farms—an act of devastation which went beyond the precedents of the Secession War—

¹ *Times History*, Vol. V, p. 86.

² See the *Return of Buildings Burnt*, June, 1900, to January, 1901 (Cd. 524), *passim*.

³ See the full account of the Vereeniging meeting in De Wet's *Three Years War*, Appendix A, pp. 406–29.

⁴ *Times History*, Vol. V, pp. 561–2. The Kaffir kraals were exempted from devastation, and the burghers were generally able to obtain food from them (do., p. 254). Many Boers who were “out” in the war have told me that they were always able to get mealies from the stores of the natives, and meat was plentiful.

The
British
methods
justified.

was justified by the military necessity of depriving the vagrant guerillas of shelter. A study of the history of the war will convince any impartial reader that there was no way of ending the struggle but that which the British commanders followed. It is absurd to prejudge the whole question by talking of methods of barbarism. The United States and Great Britain are civilised enough to be able to disregard such taunts as that. There is no rigid war law which forbids a belligerent to seize or destroy provisions (or other property) in possession of private enemy inhabitants, to prevent the combatant enemy making future use of them.¹ If there is a war right to destroy the enemy's food supplies, and if, under such peculiar conditions as existed in the Confederate States and in South Africa, the course of events has brought it about that the enemy depends for his supplies on the surplus of cereals, etc., held by the non-combatant population, then a commander is justified by the necessities of war in destroying or seizing that surplus. And he is equally justified in burning houses which have become, in all but name, shelter-tents or barracks. He should, however, make some provision for the sustenance of the people whose property he destroys.² Such provision was made by Great Britain in the shape of the Concentration Camps; and it must be remembered that the Boer farmers were well compensated for the destruction of their farms and crops at the close of the war. The magic word "compensatie" has a rich and joyous sound even to-day in the Burgher's ear. Sherman instructed his subordinate commanders in October, 1863, to carry off horses, mules, waggons, forage etc., in districts which were infested by guerillas.³ Grant has a passage on the subject

¹ The existence of such a law is affirmed by Dr. Oppenheim, *International Law*, Vol. II, p. 152.

² See Professor Holland, *Laws and Customs of War* (Official), p. 4.

³ Bowman and Irwin, *Sherman and His Campaigns*, p. 134. Dr. Lawrence says (*International Law*, p. 442) that "few would care to rest the fame of Sherman and Sheridan upon their devastations in Georgia, S. Carolina, and the Shenandoah Valley, though it was alleged in their favour that they destroyed the storehouse and granary of the Confederacy." One hesitates to point out to so high an authority that the question is not one of the fame of the two great Federal commanders, but the right or wrong, juristically, of their devastation; for, obviously, a devastation may be legally unimpeachable and may yet damage a commander's reputation, just as a badly conducted campaign may.

which contains a sound statement of the war law applying in such circumstances as obtained in 1862-5 and 1900-2.

After this ¹ [he says] I regarded it as humane to both sides to protect the persons of those found at their homes, but to consume everything that could be used to support or supply armies.

Protection was still continued over such supplies as were within the lines held by us and which we expected to continue to hold; but such supplies within the reach of Confederate armies I regarded as much contraband as arms or ordnance stores.²

"This policy, I believe," he says, "exercised a material influence in hastening the end."

The jest of the Yankee soldier who declared that "the rebellion must be suppressed if it takes the last chicken of the Confederacy,"³ was really not very far from being a correct statement of the war law of destruction of supplies. Interference with the proprietorial rights of non-combatants is not to be lightly undertaken in modern war; but those rights are not more inviolable, and, in practice, are much less easily enforceable, than the right of a belligerent to overcome his foe; and if the latter draws the means of continuing his resistance, not from regular army depôts, but from private property and supplies, the enemy cannot be bound by the fetish of a phrase to extend the privilege which is granted to private property to what is actually a means of war. The devastations of the Secession and Anglo-Boer wars are, as a matter of fact, much less objectionable, from the point of view of war law, than the destruction of the property of the poor Russian fishermen in the Crimean War, about which much less has been written. Fish-stores, fisheries, timber, spars, nets, boats, and even the homesteads of the fishers, were destroyed by the English cruisers in the sea of Azoff.⁴ It can hardly be maintained that the ruining of these poor peasants was essential to the defeat of the Russian Army. The latter army no more went in for an exclusive diet of turbot and mackerel than the English army did for one of barrelled herrings. Professor de Martens, not without some justification, uses the destruction sanctioned

Grant's views as to devastation and seizure.

Unjustifiable destruction in the Crimean War.

¹ *I.e.* after the battle of Shiloh, 7th April, 1862.

² Grant, *Memoirs*, pp. 218-9.

³ *Ibid.* p. 555.

⁴ Nolan, *op. cit.* Vol. II, pp. 390, 393, 574, 598.

by the English Government in 1854-5 to support his argument that "England has never been scrupulous in her choice of means of damaging the enemy."¹

The
cryptic
Art.
XXIII
(h).

The bearing of paragraph (h) of Article XXIII is extremely difficult to follow. As I have said in the Chapter on the Commencement of Hostilities, one of the effects of war is to suspend non-hostile relations between the subjects of the belligerent States.² "The rule is one," says Hall, "which must hold in strict law so far as no exception has been established by usage. Logically it implies the cessation of existing intercourse . . . a disability on the part of the subjects of a belligerent to sue or be sued in the courts of the other, and finally, a prohibition of fresh trading or other intercourse, and of every species of private contracts." He goes on to say that the mitigations of this rule which have taken place "have generally been either too distinctly dictated by the self-interest of the moment alone, or have been too little supported by usage to constitute established exceptions."³ It is inconceivable to me that the Hague delegates can have meant to abrogate this general rule, which is at all events an established maxim of jurisprudence in England and the United States, by a provision in a *Règlement* intended for the instruction of troops in war. Yet the terms of Article XXIII (h) are quite general and definite. Taken as they stand, they are a clear denial of Lord Stowell's famous decision that an alien enemy has no *persona standi in judicio*. Professor Holland very properly holds that, if this be the intention of the paragraph, "it can hardly, till its policy has been seriously discussed, be treated as a rule of International Law."⁴ He suggests—but himself inclines to the more general interpretation—that the clause may have been intended for the guidance of an invading commander, *i.e.* that it prescribes a line to be followed in governing and administering an invaded or occupied territory. Herein I imagine lies the explanation of this *locus desperatus*. The report of the Committee states that the

A possible
explanation.

¹ *Le Paix et la Guerre*, p. 107.

² See p. 26 *supra*. See also the many authorities quoted by Hall, *International Law*, p. 388.

³ *Ibid.* pp. 387-8.

⁴ *Laws of War on Land* (1908), p. 44.

provision was adopted unanimously, being considered "as specifying in very happy terms one of the consequences of the principles admitted in 1899."¹ Now the principles admitted in 1899 are principles bearing on the relations of invading or occupying armies and the enemy inhabitants and their property. Nothing else can be meant: for apart from these, the earlier conference admitted no principles modifying the ordinary rule of war law which presumes a suspension of friendly relations between the inhabitants of warring countries. The contemporary *Times* reports of the work of the Conference show that the German military delegate proposed "that the inviolability which the existing Convention secures for private property should be extended to contracts, and that the *exigencies of military occupation* should not furnish sufficient reason for annulling these."² "The Committee," we are told later on, "adopted unanimously without a vote a German proposal imposing upon belligerents the duty to *respect contractual obligations in an enemy's country*."³ Clearly I think the German proposal referred to in these two extracts is the present act XXIII (*h.*) As I shall show later on, the Conference of 1907 transposed the original (but amended) Article XLIV from the section dealing with "Military Authority over the Territory of a Hostile State" to the section dealing with "Hostilities," where it now appears as the final paragraph of Article XXIII: their object being to give it a more general application than it might have appeared to possess if left in the chapter which primarily deals with occupation. Something similar, I think, happened in the case of Article XXIII (*h.*) It was drafted, proposed, and adopted with reference to the case of invasion or occupation, and its intention was solely to extend to local contracts and rights of action those privileges which the former *Règlement* had provided for the property of the inhabitants. Then, in order to make its application more general, it was removed from its proper place—the section dealing with "Military Authority," etc.—and inserted in the chapter on "Hostilities"; and when the transposition was made, the wording of the paragraph was

¹ Hague II. B.B. (A.), p. 104.

² *Times*, 4 July, 1907.

³ *Ibid.* 1 August, 1907.

modified to harmonise it with its new surroundings and to generalise it, too. It is to be hoped that the next Conference may reconsider the provision and set at rest the doubts which certainly exist at present as to its force and significance.

Military
aid must
not be de-
manded
from
enemy
nationals.

The final paragraph of Article XXIII is an amendment, made at the Hague Conference of 1907, of the *Règlement* of 1899. It relieves "enemy nationals" of the odious duty of serving against their own country, even if they form part of the opposing country's army. One may wonder, perhaps, that such a provision should have been inserted in an International agreement, seeing that it trenches on a matter of purely internal sovereignty, so far as concerns the important part of the provision, namely, the exemption of enrolled aliens from bearing arms against their country of origin. Non-combatant inhabitants were sufficiently exempted from such service even before this addition was made by the former Article XLIV (1899 *Règlement*), which reads:—

Any compulsion of the population of an occupied territory to take part in military operations against their own country is prohibited.

This provision is made more general in the new regulation, which adds the important clause relating to enemy nationals serving as soldiers. Bluntschli long ago laid down the rule, by no means invariably adhered to, that, "Aliens cannot be compelled to perform military service," except when it is "necessary to defend a locality against brigands or savages."¹ "If," he says, "they were forced to serve under the flag of another state, they might have to shed their blood for a cause which is indifferent to them, or for interests opposed to those of their fatherland." In any political war—*i.e.* in effect any civilised war—he held that they could not legitimately be called to arms. Another, perhaps more practical, reason for exempting them from serving against their country of origin is to be found in the consideration that the state which employs them as soldiers is forcing them to commit treason.² If the provision

¹ Bluntschli, *Droit International Codifié*, sec. 391.

² "The only exception to this rule" [*i.e.* that persons enrolled in the enemy's fighting forces are enemies to the fullest extent] "occurs when a state finds subjects of its own fighting against it in the ranks of its foes. In

of 1907 is complied with, as no doubt it will be, there will no longer be any uncertainty as to whether men who bear arms against their fatherland have acted of their free will and with their eyes open, or under compulsion. Their culpability will be established. The rule is sane and benignant, and makes for freedom. The growth of the modern spirit of nationalism has made impossible a revival of the old practice of incorporating in a victorious army the army of the defeated belligerent. When Frederick the Great overwhelmed Saxony in the Seven Years War, "seventeen thousand men who had been in the camp of Pirna were half compelled, half persuaded, to enlist under the conqueror."¹ It was a common practice for an invader to levy recruits in his enemy's territory.² An occupied country was treated as part and parcel of the occupying belligerent's dominions, and he exercised therein the full rights of sovereignty. The new conception of occupation (a conception approved at the Hague) as a state of fact, a mere incident of warfare, which in no wise transfers allegiance, entails as a necessary consequence the abandonment by the occupying belligerent of all acts of sovereignty in his enemy's territory, and especially the raising of recruits therein. One wonders how recruits so obtained could ever have proved very reliable troops under their new flag. With the passing of mercenary armies, and the general advance of liberalism and civilisation, Frederick's dictum that it is a commander's business to supplement his army by pressing men in an enemy's country,³ has become a mere archaeological curiosity. The spirit of modernity condemns it, not less than the letter of the Hague regulation. Apart from other considerations, the provision of 1907 is of benefit to the belligerent whose rights it limits. There are obvious disadvantages to an army in the field in having enemy nationals

Former
practice
in the
matter.!

such a case it would have the right, should it capture them, to execute them as traitors, instead of treating them as prisoners of war." (Lawrence, *International Law*, p. 315.) Some states—*e.g.* Great Britain—since the Naturalisation Act of 1870, regard the assumption of citizenship of another state as divesting the person concerned of his former citizenship completely and for all purposes. Others hold that their former citizens, naturalised abroad, are still liable to punishment with death if they bear arms against their country of origin (*ibid.* pp. 195-7).

¹ Macaulay, *Essay on Frederick the Great*.

² See Hall, *International Law*, pp. 463-4.

³ *Ibid.* p. 463.

in its ranks, fighting, not voluntarily, but under compulsion, against their own kith and kin. When, in 1897, a law was proposed in Belgium to compel alien residents to serve in the civic guard, the protests of Great Britain, the United States, and France led to its renunciation by the Belgian Government. "The proposed law," say M. Bonfils, "was not without danger to Belgium herself; at Antwerp the German colony is so numerous that the law would have led to the militia being largely composed of German subjects."¹ The danger of an intermixture of possibly disloyal elements with the national forces is met to some degree in the case of the British army by the provision of the Army Act [section 95 (1)] which allows the enlistment of aliens only in the proportion of one to fifty British subjects in any corps of the regular army.²

Voluntary
service of
enemy
nationals
may be
accepted.

Irregular
Boer
action in
1899-1900.

It is to be noted that the final paragraph of Article XXIII only forbids compulsion to serve in the enemy's army. The acceptance of voluntary service is in no wise prohibited. The man who volunteers to fight against his native land commits the penal offence of treason against the latter, but the belligerent who accepts his services breaks no war law. It may indeed be a nice question when compulsion begins and free-will ends. For instance, the Boers who invaded northern Cape Colony, British Bechuanaland, and Griqualand West in 1899-1900, though they did not actually take unwilling recruits with them on command, adopted a line of conduct that amounted to compulsion. They did not say to any British subject, "Join us, or we'll compel you to do so"; but they said, in effect, "Join us, or we'll drive you from your home and commandeer your goods." After the annexation of the Cape Colony districts held by the invading Boers, "wavering burghers were impelled to take up arms by being told that to do so was their obligation as Transvaal or Free State burghers."³ The Colesburg, Aliwal, Albert and Barkly East districts were subjected to the Boer commando law.⁴ Those who refused to rebel were in some cases taken

¹ Bonfils, *op. cit.* sec. 445, note.

² See *Manual of Military Law*, 1907, pp. 189, 358.

³ *Times History*, Vol. II, p. 273.

⁴ Maurice, *Official History*, Vol. I, p. 275; Lawrence, *International Law*, p. 345, note.

prisoners to Pretoria; others were expelled and sent to the British lines.¹ In Bechuanaland and Griqualand West, "a great number of loyalists were driven out and forced to trek south, undergoing many hardships and much worrying from Boer officials, before they reached Lord Methuen's lines on the Modder River."² Mr. Schreiner, the Premier of Cape Colony and a Boer sympathiser, protested vigorously to President Steyn against the action of the Boer commandants in "summoning the English residents to arms under pain of expulsion or confiscation of their goods."³ Lord Roberts also protested in a letter dated 5th February, 1900, and stated his opinion that it was "barbarous to attempt to force men to take sides against their own Sovereign and country by threats of spoliation and expulsion."⁴ The British military authorities adopted a much more correct attitude when the Boer Republics were occupied. In December, 1900, a Burgher "Peace Committee" was formed from among the surrendered influential Boers who had taken the oath of allegiance—a purely voluntary oath. In September of the following year the members of this committee "offered to fight on the British side and to raise levies from among their surrendered countrymen for the same purpose." Lord Kitchener readily agreed, and the result was the formation of the "National Scouts" in the Transvaal and the "Orange River Colony Volunteers" in the sister colony.⁵ The National Scouts were unofficially promised certain special advantages in the settlement of the land at the end of the war, and their families were given preferential treatment in the Concentration Camps, but there was no pressure brought to bear upon them to join the organisation. The employment of such auxiliaries may have been a mistake of policy, as embittering the commando Boers and prolonging their resistance, but it was quite unobjectionable from the standpoint of war law. The National Scouts were traitors in the eyes of their late comrades and there is no doubt, although official confirmation is lacking, that many of them were shot when captured by De

The
"National
Scouts"
in the
Anglo-
Boer war.

¹ *Times History*, Vol. III, p. 86.

² *Ibid.* Vol. II, p. 297.

³ Despagne, *op. cit.* pp. 145-6.

⁴ *Correspondence as to Destruction of Property* (Cd. 582, 1901), p. 4.

⁵ *Times History*, Vol. V, pp. 406-7. The "National Scouts" numbered 1,480 and the "O.R.C. Volunteers" 480, by the end of the war.

Wet and other commandants¹—and properly so. But Lord Kitchener was quite within his right in taking advantage of the help which they proffered, freely, and with a full knowledge of the risk.

Incite-
ment to
dis-
loyalty.

Conventional war law contains no prohibition of incitement to disloyalty. There is, however, a usage of war which empowers a commander to deal summarily with any enemy person, combatant or non-combatant, attempting to seduce his troops or the inhabitants of his country from their duty and allegiance, but whether this usage is merely the expression of an obvious requirement of self-protection (like the punishment of spying), or amounts to a prohibition of any attempt to tamper with the loyalty of the hostile army or population, is a question that is open to doubt. The evidence is in favour of the former view. An instance of the summary punishment to which I refer is found in the case of Mr. Meyer De Kock, of Belfast, Transvaal, who rode into Viljoen's lines in January, 1901, with the object of inducing the Burghers to surrender; he was tried by Court-Martial and executed. As *The Times* historian remarks, the execution was quite justified, for he tried to seduce men on commando, knowing the risk he ran.² About the same time, three other members of the Burgher Peace Committee arrived in De Wet's camp at Lindley, Orange River Colony, on a similar errand; one, a British subject, is said to have been shot, the others were flogged. Professor Despagnet correctly observes that, if these emissaries came as agents of the enemy, "their execution, though cruel, would have been in accordance with the laws of war sanctioned by all civilised countries."³ Whether established usage goes beyond allowing the menaced belligerent to protect himself as the Boers did in these cases, and actually prohibits a commander from any attempt to damage his enemy by provoking disloyalty in the hostile camp or country, is a question on which the jurists are at variance. The official manuals are silent on the point. Professor Despagnet states that "appeals to treason, defection, or desertion, especially under promise of recompense or preferential treatment, addressed

¹ Some of the National Scouts were very wealthy men. I have it on unimpeachable authority that one who was captured with five others by Chris Botha, offered £80,000 if his life was spared. The six were shot.

² *Times History*, Vol. V, p. 93.

³ Despagnet, *op. cit.*, p. 308.

by one belligerent to either the troops or the population of the hostile country, are generally considered reprehensible.”¹ Bluntschli would allow a belligerent not only to foster the rebellion of a party in a hostile State for whose sake he has gone to war (*e.g.* the Cubans in the Spanish-American War), but to encourage a party with whom he is in sympathy to revolt.² Such a principle as this would have justified the Boer delegates in organising an English revolution, in conjunction with the extreme Radicals and Pro-Boers, as a diversion and legitimate measure of defence, in 1899–1902. One cannot but feel that even austere judicial England would have given short shrift to the men who tried to do that. “It is, however,” Bluntschli adds, “considered contrary to the laws of honour to incite the officers or soldiers of the hostile State to treason; States have such an interest in the maintenance of military discipline that political considerations can hardly justify such a step.”³ Professor Pillet, on the other hand, allows incitement of the adversary’s forces to treason, but condemns the same action when the civil population is concerned. “Incitement to revolt,” he says, “is an attempt upon the very life of the hostile State, and this attempt, not being justified by necessity, becomes an infraction of the law of nations.”⁴ One cannot lay down any definite rule on the subject, but it is quite certain that belligerents, however they may condemn incitement of the enemy troops to treason as an academic question, have frequently adopted a procedure which virtually amounts to the same thing. The bogus French newspaper which the Germans issued during their occupation in 1870–1, and which told of the great defeats of “our” troops (*i.e.* the French) and the glorious victories of the “enemy” (Germans),⁵ were really aimed at undermining the *moral* of the French soldiers and inducing them to give up the struggle. When the Prussian commander sent into Metz prisoners who had been taken at Sedan, his object was the same.⁶ They were meant to confirm the tidings of the great

Incite-
ment for
troops to
treason.

¹ Despagnet, *op. cit.* p. 114.

² Bluntschli, *op. cit.* sec. 564.

³ *Ibid.* sec. 564.

⁴ Pillet, *op. cit.* pp. 97–8. He quotes authorities in support of his opinion.

⁵ Sutherland Edwards, *op. cit.* p. 59.

⁶ Hozier, *Franco-Prussian War*, Vol. II, p. 101.

disaster and to prove to their comrades in Bazaine's army the folly of further resistance. The Japanese adopted a characteristically ingenious and modern device to achieve the same end at the last siege of Port Arthur. They used a wooden mortar to launch within the enemy's lines postcards describing the happy lot of the Russian prisoners of war in Japan.¹ The Anglo-Boer war furnishes the most striking instance of an appeal addressed by one belligerent to the other's troops to desert their country's cause. This is the appeal contained in the Proclamations of 15th March and 31st May, 1900, addressed respectively "To the Burghers of the Orange Free State" and "To the Inhabitants of the South African Republic," informing them that if "they lay down their arms at once and bind themselves by oath to abstain from further participation in the war," they "will be given passes to allow them to return to their homes and will not be made prisoners of war, nor will their property be taken from them."² There can, I think, be no question but that this was an incitement to disloyalty; a summons to surrender would have taken the form of a despatch to the Boer commandants, not of a widely distributed Proclamation. It promised preferential treatment to such Burghers as would desert. Was it a breach of war law to issue these Proclamations? Professor Despagnet replies in the affirmative,³ but then he prejudges the whole question by assuming the illegitimacy of any such incitement to defection, and his premises may be questioned. A belligerent has an admitted right

¹ Ariga, *op. cit.* p. 265.

² *Proclamations of F.M. Lord Roberts* (Cd. 426, 1900), pp. 3, 7. At Mafeking, (General (then Colonel) Baden-Powell sent an amusing and characteristic message to the Boers who were besieging the town, "offering the Burghers a free pardon if they would return to their homes before he made up his mind to invade their country." Snyman protested formally against the message as an attempt to tamper with his men, but the Burghers themselves took it in better part and sent Baden-Powell a letter saying that they had expected better things of him "as a man of education and patriotism" and exhorting him "to let his troops loose as soon as possible." (*Times History*, Vol. IV, p. 589). To invite troops of good moral to defection would end, in nine cases out of ten, in a good-humoured snub, and in the tenth, in an extremely short shrift.

³ Despagnet, *op. cit.* pp. 114-5. He says "such invitations [to desert] could not be approved on the part of belligerents in an international war, such as was the war against the South African Republics."

to receive deserters from his enemy's army,¹ and he has also, of course, the right to break up his enemy's fighting organisation by every means not forbidden by war law. If he can achieve this latter object by placing before the hostile troops the advantages they will gain from abandoning the struggle, the object of the war is attained without bloodshed, to the benefit of all concerned. A cause cannot be worth fighting for, and must fail in the end, when its champions are liable to be argued into deserting it. No army which is well disciplined, and which has its heart in the struggle, has anything to fear from incitement to disloyalty. The etiquette of war may be against such incitements, but they do not appear a whit more dishonourable or underhand than the employment of mercenary spies, which is admitted by usage. In practice, as I have shown, belligerents do attempt in various ways to influence the hostile troops against their national cause, and it cannot be allowed that the usage of war condemns the practice.

The incitement of a civil population to revolt against the national Government stands on a different footing. All the jurists admit that a belligerent has the right to take advantage of a popular revolt in his enemy's country, but, as I have shown, there is some difference of opinion as to whether he is in order in exciting or encouraging it. "One must make a distinction," says Professor Le Fur, "between an insurrection or civil war which has, and one which has not, been provoked by the enemy; if he has not provoked it, he cannot be condemned for profiting by an event for which he is not responsible."² And he holds properly, I think, that the United States Government was justified in accepting the aid of the Cuban insurgents in 1898. To create a revolt is a different matter. Austria protested in 1859 against the French project of organising legions of Hungarian rebels against her, and again, in 1866, against Bismarck's plan of forming a corps of Hungarian refugees.³ France protested against the attempts made in 1870 by German agents to

Incite-
ment of
popula-
tion to
revolt.

¹ Pillet, *op. cit.* p. 97; Bonfils, *op. cit.* sec. 1105, who says that a commander has the *right* to send back deserters, but "generally, in practice, deserters and refugees are not sent back."

² *R.D.I.* September-October, 1898, p. 755.

³ Despagne, *op. cit.* p. 114, note.

stir up a revolt in Algeria.¹ The modern principle of the distinctive status of combatants and non-combatants supplies a criterion for deciding the question. If a commander demands that the civil inhabitants of a hostile country occupied by him shall refrain from all participation in the war, he cannot fairly or logically try to excite a revolt among those residing in the territory occupied by their own troops and administered by their national Government. To demand quiescence of the inhabitants in a province he holds and to create a popular revolt in a province still held by the enemy, is to deal with the whole matter on the principle of "Heads I win, Tails you lose!" On the whole it may be concluded that practice, as evidenced by the protests² of 1859, 1866, and 1870, referred to above, and considerations of reason and equity, are against allowing a commander to *incite* insurrection; in other words, incitement of this kind may be held to be a breach of the usages of war and, as such, to warrant the aggrieved belligerent demanding its discontinuance and rectification, or, in the last resort, adopting reprisals.

Meaning
of
"taking
part in the
operations
of war."

A belligerent is forbidden to force the enemy's nationals "*à prendre part aux opérations de guerre dirigées contre leur pays.*" To this provision, the Austrian delegate at the Hague Conference of 1907 wished to add the words "as combatants," but the proposal was rejected.³ How far then does the prohibition go? It evidently means more than that a citizen of an invaded country is not to be forced to fight against his countrymen in the national armies. In 1870 the Germans were blamed by a writer in the *Quarterly* for having forced the invaded to do "military work." As to this Mr. Sutherland Edwards remarks:—

German
practice
in 1870-1.

The only military work that I know of the invaded having been forced to do in France was on roads, where, after they had dug trenches and thrown up embankments for opposing the advance of

¹ *R.D.I.* September-October, 1898, p. 755.

² As evidence on disputed questions of war law, protests have more weight than the practice against which they are raised. The practice is a thing of the moment, perhaps an experiment to see if any protest will be raised. The protest is deliberate and is usually addressed to neutral nations, whose sympathy is not likely to be gained by ungrounded or perverse objections to proper acts of war.

³ Hague II B.B. (A), p. 102.

the invaders, they were employed in making these impediments disappear ; and, far worse than that, on roads along which they were required to drive carts laden with shell cases, destined to be hurled when filled upon their own countrymen. That was a legitimate requirement according to the received usages of war ; but it was cruel all the same, if it could possibly have been avoided, and was at least an approach to the intolerable practice of impressing the invaded into the invaders' ranks.¹

Nor were the Germans at all disposed to allow their demands for the services of the French citizens to be treated casually. At Nancy they demanded the services of 500 French navvies for the execution of some urgent work, and when these were not immediately forthcoming, they caused the Mayor to issue the following Proclamation :—

If by to-morrow, Tuesday, 27th January (1871), at mid-day, 500 navvies are not present at the railway station, first the overseers, and then a certain number of workmen, will be taken and shot on the spot.²

But if they made abundant use of the French civil population as labourers, drivers, etc., they did not follow the bad precedent set on one occasion at least in the American War, of compelling the inhabitants to construct fortifications. This was done at Knoxville, Tennessee, in 1863, by the Federal General Burnside, who stood a siege there against James Longstreet, the stern fighter whom Lee called " his old war horse " and who settled down after the war, *more Americano*, to be a whisky agent at New Orleans. Burnside states in his report that he forced the " disloyal " (*i.e.* Secessionist) citizens to work on the trenches round the town.³ The imposition of such a duty as this is condemned by the majority of jurists,⁴ but it is sanctioned, when

United
States
practice.

¹ Edwards, *op. cit.* pp. 295-6.

² Hall, *International Law*, p. 427.

³ Longstreet, *From Manassas to Appomattox*, p. 500. He quotes Burnside's report.

⁴ Bonfils, *op. cit.* sec. 1147-8 ; Pillet, *op. cit.* pp. 198-9 ; Westlake, *International Law*, Pt. II, p. 101 (who says " we suppose that to require an enemy civilian to assist in placing a gun in position would be forbidden by Article LII of the Hague "). Oppenheim (*International Law*, Vol. II, p. 121) states that private individuals may be forced to build fortifications, but he gives no authority for his statement. Hall (*International Law*, p. 478, is rather vague ; he says an occupant belligerent may force the inhabitants " to give their personal services in matters which do not involve military action against their sovereign."

British
semi-
official
view.

outside the *rayon* of actual hostilities, by Professor Holland in his note on Article LII in the British official *Laws and Customs of War*, where he says:—

The “military operations” here intended would probably not comprise works at a distance from the scene of hostilities.¹

Pillet on
the ser-
vices an
invader
can
demand.

I cannot think that his view would have been approved by the Hague delegates. Professor Pillet remarks that although an army of invasion is entitled to utilise the services of the inhabitants for its varied needs—for transporting supplies, repairing roads, burying the dead, tending the wounded, etc.—and although these duties are in a sense subservient to hostilities, as facilitating the invader’s operations, they do not amount to direct acts of hostility in the form of specific damage to the national army. It is only such acts as are directly and distinctly subservient to military operations—such as building fortifications, making munitions, repairing arms, or giving information as to the enemy’s position and numbers—that an invader is forbidden to demand of the “passive enemy.” I shall deal with the important question of the employment of enemy nationals as guides in a later chapter.²

Ruses of
war.

Article XXIV deals with stratagems and reconnaissance or intelligence work generally. As to the latter little need be said, as I shall touch upon it in connection with the question of spies and guides. Ruses of war have always been recognised both in the practice and the theory of war rights. Provided they do not involve treachery or a breach of an express or tacit convention, they are quite unobjectionable.³ Ambushes, surprises, night attacks, feint attacks, skirmishes, nay, nearly every operation of attack or defence partakes of the nature of a stratagem. The stratagem is the means which the astute commander adopts to maximise the tactical advantages or minimise the disadvantages which fortune has provided; or

¹ *Op. cit.* p. 37. He refers back to his note on Article VI of the *Règlement* (as to the works that prisoners of war may be forced to do), where he says:—“Work even upon fortifications, at a distance from the scene of hostilities, would not seem to be prohibited by this paragraph” (p. 11).

² See pp. 368–371.

³ See Bonfils, *op. cit.* sec. 1073; Pillet, *op. cit.* p. 93; Hall, *International Law*, p. 535; Lawrence, *International Law*, p. 444; Westlake, *International Law*, Part II, pp. 73–4.

perhaps more often to gain or keep the power of dictating to his opponent the when and where of the critical encounter. Every tactic is more or less a ruse; but the term is confined rather to a tactical movement in which there is deceit of some kind or other. Certain specific ruses war law forbids. It forbids a soldier who wishes to deceive his enemy to assume certain symbols, or do certain acts to which, as it were, *sanctuary* attaches, in accordance with an express or implied war usage. An enemy must not be placed at a disadvantage by reason of his reliance on the *bona fides* of the assumption of the symbol or the performance of the act. Such a symbol is the flag of truce, the Geneva flag, the enemy's national flag or uniform; and the holding up of one's hands, or the throwing down of one's arms, in sign of surrender, is an act of the kind I refer to. In such cases as these, "an understanding exists that particular acts shall be done, or signs used, or characters assumed, for the appropriate purposes only; and it is consequently forbidden to employ them to deceive an enemy."¹ With these forbidden ruses I deal separately. Beyond them lies an endless variety of ruses in which the ancient maxim has force and application that "all is fair in (love and) war." War law admits them on the ground that a grown-up army should not let itself be taken in by booby-traps. The "Quaker guns"—logs shaped like ordinary cannon and mounted on wheels—which the Confederates used at Vicksburg to induce the besieging Federals to credit them with an heavier armament than they possessed²; the paroling of Federal prisoners at Richmond in June, 1862, after they had been allowed to see the troop trains starting for the West with fresh men for Stonewall Jackson, who all the time was but waiting for the word to move eastward and hurl himself on the right wing of the unsuspecting Federals;³ the tents that Lord Roberts left standing at Modder River when he moved away on his great flank march which was to end in the capture of Cronje at Paardeburg;⁴ the use of the English bugle-calls and words of command by the Boers in the same war, are all

Permissible
ruses.

¹ Hall, *International Law*, p. 536.

² Grant, *Memoirs*, p. 226.

³ Henderson, *Stonewall Jackson*, Vol. I, p. 391.

⁴ *Times History*, Vol. III, p. 381.

Baden-Powell's
ruses.

instances of legitimate ruses of war. Baden-Powell fairly over-ran his Boer besiegers with stratagem at Mafeking.

He had some large megaphones manufactured, the chief use of which was to send bogus orders, audible to the Boers, about movements to threaten some of their trenches; dummy forts and dummy armoured trains were set up as baits, which proved most successful in attracting a great deal of Boer fire; on one occasion he armed some men with lances manufactured at the railway workshops, and conducted them round all the trenches well on the skyline, in order to make the Boers believe that a detachment of the lancers, so dreaded since Elandslaagte, had secretly come in from the south to reinforce him. By repeating the lamp signals previously used on the occasion of a night attack, he induced the Boers on another night to keep up aimless volleys at empty space from some of the trenches that seemed to be threatened.¹

Japanese
ruse in
1904.

The concealment of cannon in deftly arranged branches or brushwood is a common device of gunners, but the Japanese reached a dizzy and dramatic height of stratagem when they actually transformed the face of nature as a means of masking their batteries. On the night before the battle of the Yalu they transplanted trees to hide the tell-tale discharge of their artillery, choosing those growing either directly in front or directly behind the entrenchment that was to be concealed. "Thus next morning the landscape appeared unchanged from the Russian side of the river, as the fact that a tree of a particular shape had advanced or retired 200 or 300 yards during the night was naturally imperceptible."² The Confederate commander, Van Dorn, smuggled medicine (which was contraband of war) out of Memphis under Sherman's nose in 1863, by the device of sending it in a hearse, under pretence of a big funeral. "It was a good trick," says Sherman, "but diminished our respect for such pageants in future."³ J. B. Gordon very nearly succeeded in forcing the right of Grant's lines at Petersburg in March, 1865, by the ruse of sending his pickets creeping through the Federal lines as if to desert. Deserters had been coming in with great frequency about this time and Grant's pickets, taking these men for deserters too, were overpowered and captured before they grasped their mistake.⁴

Ruses
in the
Secession
War.

¹ *Times History*, Vol. IV, pp. 588-9.

² Sir Ian Hamilton, *Staff Officer's Scrap Book*, p. 107.

³ Sherman, *Memoirs*, Vol. I, p. 285. ⁴ Grant, *Memoirs*, p. 596.

A doubtful stratagem was that of the French at Metz in 1870, when

they sent out some Prussian sick and wounded in a train, and the next day the identical train again came out; but this time, instead of being filled with sick and wounded, it was filled with healthy French troops having with them two mitrailleuses, who sprang upon the Prussians like wolves, taking them altogether by surprise.¹

They captured over 100 prisoners, but, apart from the fact that the bringing of prisoners into Metz, already short of food supplies, was of questionable advantage, the ruse is open to the objection that it shut the door, for the future, to the restoral of sick and wounded prisoners, to the latter's detriment. The most famous—some would say the most infamous—of all ruses was that by which Marshals Lannes and Murat induced the Prince of Auersberg to withdraw his troops from the bridge over the Danube at Vienna in 1805, by assuring him on their honour that an armistice had been concluded. Nearly all jurists have condemned the action of the French Marshals,² but it is championed by the weighty and impartial authority of De Martens.³ One cannot condemn it on the ground that it was deceit; all stratagem is deceit. A capable army commander must and does "act lies" over and over again in a campaign. In this respect the standards of honour in war and in peace are poles asunder. If it is, as I shall try to show later on,⁴ a permissible ruse for a commander to withdraw his men from a dangerous position under cover of a flag of truce, the action of Murat and Lannes would not appear to be open to any objection as a breach of war usage. There is also the consideration to be taken into account that a commander is not bound to accept his adversary's notification of the conclusion of an armistice. On the other hand, belligerents do rely on each other's word of honour in many of the *commencia* of warfare, and it would seem that a commander is forbidden by the etiquette of war to deceive his opponent by a false statement, though quite at liberty to

The famous ruse of Murat and Lannes.

¹ *Times* Correspondent's despatch, quoted Cassell's *History*, Vol. I, p. 279.

² Pillet, *op. cit.* p. 94; Westlake, *International Law*, Part II, p. 74.

³ De Martens, *op. cit.* p. 414.

⁴ See p. 229.

do so by an "acted lie." It may be true that the maxim *vigilantibus jura scripta* is applicable to International as well as Municipal Law, and that the too-trustful commander cannot complain if he finds his easy confidence misplaced; but one cannot help feeling that the French Marshals smirched their own honour and that of France and the French army by what they did at the Danube bridge. Can one conceive Outram doing as they did—Outram, compared with whom "the lion was a coward and the fox a fool"? Perhaps the best verdict, and the deepest for all its seeming simplicity, on the incident is that of the French General Marbot—"As for me, I should not like to do such a thing in similar circumstances."¹

¹ Pillet, *op. cit.* p. 95. There is a good chapter on ruses in the French *Official Manuel à l'Usage, etc.* p. 18.

CHAPTER V

HOSTILITIES—SIEGES AND BOMBARDMENTS.

Conventional Law of War, Hague Règlement, Articles XXV to XXVIII.

ARTICLE XXV.

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

ARTICLE XXVI.

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE XXVII.

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

ARTICLE XXVIII.

The pillage of a town or place, even when taken by assault, is prohibited.

“BOMBARDMENT,” says Professor Pillet, “is the gravest of all the measures of which a general can assume the responsibility. It clashes diametrically with the first principles of the law of nations, which command us only to attack those who can defend themselves. It is violation of that great law of reason which

Bombardment an extreme measure.

sanctions such injury only being inflicted as is necessitated by the object of the war.”¹ It is the impossibility of separating a fortified or defended town from its inhabitants which justifies the bombardment of it; there is a certain solidarity between the garrison and the residents which makes them, as it were, brothers in misfortune when the enemy is at the gates. The usage of war assimilates a city which is defended to a fortress, and so it allows an assailant to hurl his shells into it, to the possible injury of its non-combatant population. The latter are regarded, with no real justification in fact, as having exposed themselves to war chances; as, for instance, civilians who happened to be present with an army in campaign, when attacked, would be regarded. As a matter of fact the inhabitants of a beleaguered city are simply in their proper and permanent abode and they have usually no power of withdrawing. It is most unjust, as Pillet observes, that they should be subjected to attack, while if they try to defend themselves, they are considered to break the rules of war: witness the tragedy of Bazeilles.² However illogical it may be, the right to bombard a defended town is admitted by practice, by all jurists, and by the official manuals.

Unforti-
fied towns
may be
bom-
barded if
defended.

It is to be noted that Article XXV forbids the bombardment of towns, etc., which are *undefended*. “A place, although not fortified, may be bombarded if it is defended.”³ This principle was acted upon by the Germans in 1870, and when M. de Chaudordy protested (in a circular addressed to the French diplomatic agents at neutral Courts) against the bombardment of open towns which defended themselves,⁴ he was guilty of either disingenuousness or an error in his war law. The French themselves bombarded Kehl, an open town on the German side of the Rhine opposite Strasburg, and justified their action on the ground that fire was directed therefrom upon Strasburg.⁵

¹ Pillet, *op. cit.* p. 102.

² *Ibid.* p. 104. See Bonfils, sec. 1081; Hall, *International Law*, p. 396.

³ Professor Holland in the *British Official Laws and Customs of War*, p. 30.

⁴ The circular is given in Cassell's *History*, Vol. I, 221; see Busch's *Bismarck*, Vol. II, p. 121.

⁵ The French reply to General von Werder's remonstrances is given in the *German Official History*, Part I, Vol. II, p. 445.

Again at Amiens, when the German General Von Goben occupied the city, the French troops who held the citadel opened fire from it upon the town, regardless of its being full of their peaceful fellow-countrymen. The Mayor of Amiens was reduced to begging the German general to persuade the French commander to surrender and so save the town from injury.¹ Defended towns, even if unfortified, have always been regarded as liable to bombardment. Sumner, the Federal general, threatened to shell Fredericksburg, an open town, in 1862, if it sheltered Confederate troops.² Similarly, in 1870, the Prussians sent in word to Elboeuf in Normandy that, unless the French troops evacuated it, they would drive them out by bombardment. "Here, then," says Mr. Sutherland Edwards, "was a case of an open town being threatened with bombardment—a fate to which, notwithstanding a popular belief to the contrary, every town, fortified or unfortified, which defends itself, is equally exposed."³ Vernon, an open town, was shelled because shots were fired from it upon the Prussians.⁴ It is quite beyond the point to take a belligerent to task (as M. Politis does the Turks for the shelling of Arta in 1897) for bombarding a town that is not "seriously fortified."⁵ No one can tell to-day whether a town is "seriously" fortified or not. On 20th July, 1877, Plevna was "an absolutely open town, there being no fortification of any kind."⁶ On 30th July, 1877, only half of it was surrounded by redoubts, yet its defenders were able, on that day of wrath, to hurl back a desperate Russian assault with terrible slaughter.⁷ Sebastopol, Vicksburg, and Richmond, too, maintained notable defences, yet they, like Plevna, were but imperfectly (*i.e.* not "seriously") fortified when first besieged; their earthworks, trenches, and redoubts were being continually extended and strengthened during the progress of the siege.⁸ It was the

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 160. Admiral Cervera threatened to bombard Santiago in 1898 if the American troops entered it. (Titherington, *op. cit.* p. 269.)

² Longstreet, *op. cit.* p. 293.

³ Edwards, *op. cit.* p. 277.

⁴ *Ibid.* p. 260.

⁵ *R.D.I.* September-October, 1897, p. 686.

⁶ W. V. Herbert, *The Defence of Plevna, 1877, written by one who took part in it*, p. 134.

⁷ W. V. Herbert, *op. cit.*, pp. 163, 207.

⁸ *The Russian Army and its Campaign in Turkey, 1877-8*, by F. V. Greene, Lieutenant, Corps of Engineers, U.S.A., p. 316.

enduring spirit of Totleben, of Joseph Johnston (for though he was without the walls, he, and not Pemberton, was assuredly the soul of the Vicksburg defence), of Lee, of Osman, and not the perfection of bastion, fort, and parapet, which made the strength of the resistance in these sieges. The walled city is nothing unless the heart and brain of a great commander guide the defence.

Bombardment of open town which participates in defence of a fortified one.

The peculiar case of Mézières and Charleville gave rise to an instructive discussion in the Franco-German War. The former was a strong fortress on the Meuse; on the opposite side of the river stands the wealthy manufacturing town of Charleville, round which the French had constructed small advanced works, shelter-trenches and road barricades. The commandant at Mézières, Colonel Blondeau, requested the German general Von Kameke to treat Charleville as an open town, but the latter refused on the ground that it was occupied by the enemy's troops. Both towns were bombarded (31st December, 1870) and considerable damage was done to Charleville before the French commandant hoisted the white flag.¹

It was doubtless the remembrance of this case which led to the insertion in the Protocol of the Brussels Conference, as a commentary and accepted interpretation of the rules given in the text, of the following clause (proposed by the president and approved by the meeting):—

Every open town which is situated near a fortress and co-operates in its defence is subject to the application of the first part of Article 14 [*i.e.* of the original Project, which subjected fortified towns to bombardment]. If it does not co-operate in the defence it is protected by the principle of the second part of the same paragraph [as being undefended].²

The practical value of the rule given in this Brussels "gloss" is, I think, doubtful. If the possession of an unoccupied, undefended, unfortified town, near a defended fortress, is of *no* importance for tactical purposes to either defender or assailant, the latter will certainly not waste time and shell in bombarding it. But if it is of value to the defender—because

¹ German Official *History*, Part II, Vol. II, pp. 123-7.

² Brussels B.B. p. 196.

it obstructs a line of attack, because it offers him a shelter to fall back upon should the fortress prove untenable, or because of some other military reason—then it seems to me that the attacker could justify a bombardment of it under the plea of military necessity; it is practically included in the perimeter of defence and may be considered as co-operating with the fortress. At any rate, the very sound and reasonable French *Manuel* admits the right to bombard the town in such circumstances as I have mentioned, “if the fire of the neighbouring fort prevents the attacker entering the town and maintaining himself there”;¹ presumably because the very fact that the commandant of the fortress opposes the enemy’s access to the town shows that the possession of the latter must be a matter of tactical moment. Again, as the German *Manual* points out, a town may be simply *occupied*, not defended, and in such a case too bombardment is legitimate, for the occupation is part of a system of defence. “Bombardment is justified and demanded by military necessity when the occupation of the locality has not been designed for defensive purposes, but only to guard a passage, to defend approaches, to protect a retreat, to prepare or cover a tactical movement, to procure provisions.”² It would be idle to deny the assailant a right to bombard in such a case, as the Institute of International Law endeavoured to do in 1896.³

The usage of war allows a commander to range his guns over the whole of the defended city, save and except where military necessities permit of his sparing the buildings, etc., mentioned in Article XXVII. History furnishes copious examples of the practice. In the Crimean War indeed the French and English artillerists are stated to have aimed their fire only on the fortifications of Sebastopol,⁴ and perhaps the damage that was done to the town was due to the heavy banks of smoke which obscured the gunners’ aim.⁵ At Nikopol in 1877 the Russians refrained from aiming at the town and concentrated their fire on the Turkish batteries.⁶ But they

¹ French Official *Manuel à l’Usage*, etc. p. 20.

² *Kriegsbrauch im Landkriege*, p. 21.

³ Holland, *Studies in International Law*, pp. 106-111.

⁴ Bonfil, *op. cit.* sec. 1084.

⁵ Nolan’s *War against Russia*, Vol. I, p. 500.

⁶ De Martens, *op. cit.* p. 400.

undoubtedly fired on the town of Rustchuk in the same war,¹ and the Germans showed a similar indifference to the interests of peaceful residents in their bombardment of the French cities in 1870. At Strasburg, Paris, Soissons, Verdun, Montmédy, Longwy, Péronne, the towns themselves were made the mark of the invaders' shells and very great damage to the life and property of the civilian inhabitants resulted.² The town and works of Strasburg were bombarded incessantly, day and night, at first; when the first parallel was opened and regular siege operations were commenced, General von Werder directed his artillery to shell the works by day and the town by night.³ When the town surrendered, 448 private houses had been destroyed completely, nearly 3,000 (out of a total of 5,150) were more or less injured, 1,700 civilians had been killed and wounded, and 10,000 persons were made homeless.⁴ The total damage done to the city was estimated at nearly £8,000,000. Compared to the fate of Strasburg, Paris escaped almost unscathed, the casualties among the civil population numbering only 296, of whom 141 were women and children.⁵ At Soissons far more havoc was wrought in the town than in the defences.⁶ Verdun suffered even more heavily than Strasburg, though the town was surrounded by an *enceinte* of ten bastioned forts.⁷ The upper town of Montmédy was nearly destroyed.⁸ At Longwy—"a crowded fortress" Sir Henry Hozier calls it—all the public buildings were destroyed and nearly every house was damaged.⁹ At Péronne "when half the houses had been demolished the commandant, after a twelve days' bombardment, which had injured neither the walls nor the guns nor one soldier in the garrison, gave in."¹⁰ Two such eminent writers as Mr. Sutherland Edwards and M. Rolin Jacquemyns have approved of the Prussian system of reducing towns by "simple bombardment," as in the cases mentioned above. Their argument is

¹ De Martens, *op. cit.* p. 400.

² See Hall, *International Law*, p. 535.

³ German Official *History*, Part I, Vol. II, p. 458.

⁴ Hozier, *Franco-Prussian War*, Vol. II, p. 71.

⁵ Cassell's *History*, Vol. II, p. 205.

⁶ Hozier, *Franco-Prussian War*, Vol. II, p. 85.

⁷ *Ibid.* p. 157.

⁸ *Ibid.* p. 213.

⁹ *Ibid.* p. 229.

¹⁰ Sutherland Edwards, *op. cit.* p. 183. Twelve inhabitants were killed (*loc. cit.*).

that such a method tends to abbreviate fighting, and that the stress placed upon the peaceful population of a defended city is therefore justifiable as saving greater loss of life in the end. Dr. Busch has stated that the German artillery "did not fire intentionally upon private houses,"¹ but the German official *History* of the war shows clearly that the military staff at Strasburg directed the bombardment, in part at least, with the object of bringing pressure on the residents. It was expected, we are told, that

A serious cannonade from the siege batteries upon the closely-built town, sparingly provided as it was known to be with bomb-proof shelters, would overawe to a considerable degree the less trustworthy parts of the garrison, and probably induce the inhabitants to compel the governor to surrender the fortress.²

The view which here emerges is one which cannot be too vigorously combated. Even the great jurists of Germany have condemned the argument that the end justifies the means as applied to cases of this kind.³ Bluntschli remarks with perfect truth that the endeavour to capture a fortified town by "psychological pressure" on the inhabitants is "profoundly immoral."⁴ It is to set back the clock of International Law to allow a belligerent a war right to employ any measure at his own sweet will because it will abbreviate fighting. "If this tendency to shorten a war be the final justification of military proceedings, the ground begins to slip from under us against the use of aconitine or of clothes infected with smallpox."⁵ Moreover, as Bluntschli points out, success rarely attends the attempt to intimidate the civil inhabitants of a beleaguered city into influencing the garrison to surrender.⁶ The terrible shelling of Strasburg only roused the citizens to a stronger determination.⁷ The special correspondent of the *Daily News* at Strasburg wrote at the time of the capitulation—

Bombard-
ing in
order to
produce
psycho-
logical
pressure
is illegiti-
mate.

On the authority of a member of the Council of Defence, to whom the whole truth was well known, I can now state, without fear of

¹ Busch, *Bismarck*, Vol. II, p. 228.

² German Official *History*. Part I, Vol. II, p. 446.

³ See Bonfils, *op. cit.* sec. 1084, for the views of Bluntschli and Geffcken.

⁴ Bluntschli, *op. cit.* sec. 554 bis.

⁵ Farrer, *Military Manners and Customs*, p. 106.

⁶ Bluntschli, *loc. cit.* ⁷ Hozier, *Franco-Prussian War*, Vol. II, p. 61.

contradiction, that Governor Ulrich was always in perfect accord with the inhabitants and that if, in their opinion, he erred at all, it was in capitulating prematurely.¹

Bombardment need not be confined to works of a city.

If the Germans advanced a dangerous principle to excuse their indiscriminate method of bombardment, their practice went but little beyond that which has been followed in most modern wars. Belligerents are bound by no rigid rule to confine their attack to the fortifications of a beleaguered city. The solidarity between the troops and the inhabitants of a fortified town, to which I have already referred, may almost be said to deprive the latter, temporarily, of their non-combatant character.² The town as well as the works of Alexandria were shelled by the British in 1882.³ The Turks turned their guns on the town of Pharsalus in 1897.⁴ About 60 houses were destroyed in Santiago during the bombardment by the United States fleet,⁵ and at San Juan 14 civilians are said to have been killed, in what Mr. Titherington described as "one of the shocking but inevitable incidents of war."⁶ The Boers shelled both the defences and the houses at Kimberley, and 5 civilians were killed and 24 wounded as a result.⁷ There, as at Ladysmith, "the Boer gunners preferred the wider mark of the town as the object of their shell fire to a systematic concentration of fire upon any individual redoubt or work."⁸ Mafeking town was badly handled in Snyman's and Cronje's bombardments, hardly a house escaping without some unpleasant souvenir of the Boer fire.⁹ As to the siege of Port Arthur in 1904, Mr. Ellis Ashmead-Bartlett says that many of the shells passed over the forts into the town and there was hardly a house in the latter which had not been hit during the siege and some were reduced to nothing but heaps of ashes and charred wood.¹⁰

¹ *Daily News War Correspondence*, p. 205.

² J. S. Risley, *The Law of War*, p. 117.

³ Pillet, *op. cit.* p. 104.

⁴ *R.D.I.* September-October, 1897, p. 687.

⁵ See J. B. Atkins, *The War in Cuba*, p. 197, who gives the number of houses destroyed as 67; Titherington, *Spanish-American War*, p. 306, says 69.

⁶ Titherington, *op. cit.* p. 165.

⁷ Maurice, *Official History*, Vol. II, pp. 57, 72.

⁸ *Times History*, Vol. IV, p. 559.

⁹ Mackern, *Sidelights on the March*, p. 248, where see photographs of some of the damaged houses.

¹⁰ E. Ashmead-Bartlett, *Port Arthur*, p. 438.

No doubt it is a matter of very great difficulty to confine the effects of long distance shell-fire to a circumscribed area. "Long Toms" and Howitzers are apt to be indiscriminating in their touch and even the most exact and scientific gunnery can hardly ensure that a shell finds its proper billet 9,000 yards away. On the other hand, the modern tendency is to throw out the defences of a city to a very much greater distance than was once the custom. "The fortress is now an 'entrenched camp,' whose perimeter tends constantly to increase."¹ Sieges are now more or less *field* operations. Sir Ian Hamilton relates a very instructive speech of General Nogi's, in this connection. He said a town or harbour

Fortress
now an en-
trenched
camp.

Can only be saved from destruction by outlying forts, 12 kilometres (8 miles) distant from the vitals they are meant to cover. . . . As for a fortified harbour or town without any outlying works whatever, I would merely call that an expensive shell trap.²

Strasbourg suffered so terribly in 1870 mainly because there were no detached forts around the town and the ramparts were so close to the houses that the one could not be shelled without damaging the other.³ Metz, on the other hand, suffered little because, "with its girdle of detached forts, it was the one fortress in France where the inhabitants were safe from the besiegers' fire."⁴ When Sherman bombarded Atlanta in 1864, Hood protested against the method he adopted. Hood wrote.—

. . . You fired into the habitations of women and children for weeks, firing far above and miles beyond my line of defence. I have too good an opinion, founded both upon observation and experience, of the skill of your artillerists, to credit the insinuation that they for several weeks unintentionally fired too high for my modest field-works, and slaughtered women and children by accident and want of skill.⁵

Sherman's explanation was:

. . . You defended Atlanta on a line so close to town that every cannon-shot and many musket-shots from our line of investment,

¹ See a paper, "The Crisis in Fortification," in the *R. E. Journal*, September, 1907 (translated from the French).

² *A Staff Officer's Scrap Book*, Vol. II, p. 311.

³ Hozier, *Franco-Prussian War*, Vol. II, p. 60.

⁴ Sutherland Edwards, *op. cit.* p. 181.

⁵ Sherman, *Memoirs*, Vol. II, p. 122.

that overshot their mark, went into the habitations of women and children. General Hardee did the same at Jonesboro', and General Johnston did the same, last summer, at Jackson, Mississippi.¹

To day, given armaments of fairly equal range (and, generally speaking, the defenders' guns ought to be able to outrange the aggressors') and defences pushed well out, a defender ought to be able to prevent the city on which he is based being bombarded at all. Bombardment from dirigible balloons will soon have to be reckoned with, of course, and, no doubt, bombardment from aeroplanes too in the course of time, but so far as terrestrial war is concerned the march of events may bring it about that "simple bombardment" of inhabited cities will become an impossibility, simply as a natural consequence of changed methods of defensive war. It is sincerely to be hoped that it may be so. As Hall observes, "the bombardment of a town in the course of a siege, when in strict necessity operations need only be directed against the works, . . . is an act which, though permissible by custom, is a glaring violation of the principle by which custom professes to be governed."²

When the Brussels Conference was sitting in 1874, the town of Antwerp submitted a petition praying the Conference to adopt the principle that, when a fortified town was bombarded, the fire of the artillery should be directed solely against the forts and not against private houses belonging to inoffensive citizens.³ The Committee of Conference which considered the petition made the following reply:—

The Committee placed this communication on record. It agreed to declare that, according to the principles which preside over these deliberations, the operations of war should be directed

¹ Sherman, *Memoirs*, Vol. II, p. 120. In the Seven Weeks' War, "Prague, though surrounded by ramparts, struck the Austrian colours without firing a shot, because the Prussian guns would at the same time have played upon the defenders and the parapets, the unprotected citizens, and the rich storehouses of the merchants." (Hozier, *Seven Weeks' War*, p. 73.) The lesson taught by this war, that "fortifications which enclose a town of any size are comparatively useless, unless the defensive works are so far in front of the houses as to preclude the possibility of the bombardment of the city" (*ibid.* p. 73), would not appear even yet to have been entirely mastered by military engineers.

² Hall, *International Law*, p. 396. See *Manuel à l'Usage etc.* p. 22.

³ Brussels B.B. p. 197.

Simple bombardment may become obsolete.

Reply of the Brussels Conference to the Antwerp petition as to bombardments.

exclusively against the forces and the means of making war of the hostile State, and not against its subjects so long as the latter do not themselves take an active part in the war.

Moreover, a special Article of the Project submitted for their examination expressly stipulates that private property shall be respected, and no exceptions are made to this rule but those which are strictly justified by the absolute necessities of the war.

These principles testify that the Conference is already moved by the humane desire expressed by the citizens of Antwerp, and the object of its deliberations is to seek every practical means of carrying out that idea.

It is to be hoped that these principles will, in the future, bring about a realisation of the desire of the citizens of Antwerp.

In the meanwhile, the Committee has entire confidence that every commander of civilised armies, acting in conformity with the principles which it is the mission of the Conference to sanction by an international regulation, would always consider it a sacred duty to employ every means in his power, in the case of a siege of a fortified town, to cause private property belonging to inoffensive citizens to be respected, as far as local circumstances and the necessities of war will admit.¹

One cannot but recognise that the principles here laid down have not brought about "a realisation of a desire of the citizens of Antwerp." Every siege since 1874 has seen the houses of innocent citizens battered to pieces, unintentionally, no doubt, but it matters little to the unfortunate householder whether the destruction of his home is deliberate or accidental. And so long as towns are bombarded, peaceful inhabitants must suffer. It is a necessity of war which can only pass with a change in the circumstances which make bombardment possible at all.

The bombardment of undefended towns, etc., in maritime war was considered at the Hague Conference in 1907, which aimed at "applying to this operation of war the principles of the Regulations of 1899 respecting the Laws and Customs of Land War." The following rules were agreed to, and though they do not appear in the *Règlement* on Land War, they are clearly applicable to all bombardments. They practically reproduce the recommendations on the subject made by the Institute of International Law in its 1896 session, when it was

Bombardment of undefended towns in sea war.

¹ Brussels B.B. p. 285.

unanimously agreed that there is no difference between the rules of war as to bombardment by military and naval forces.¹ The first Article forbids the bombardment of undefended ports, towns, etc.; then comes—

Article II.

Military works, military or naval establishments, dépôts of arms or war *matériel*, workshops or plant which could be utilised for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

Article III.

After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

Article IV.

Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

The Committee which examined the question of naval bombardment at the Hague declare in their Report that “the fundamental principles governing bombardment of towns, villages, and undefended dwellings, by land forces, ought to apply equally to the bombardment of ports, towns, villages, etc.,

¹ Holland, *Studies in International Law*, p. 110.

by naval belligerents,"¹ and the principles enunciated in the three articles above may be taken as representing the war law on the subject of the bombardment of undefended places, subject to such slight modifications as the difference between sea and land warfare renders necessary.

The nature of these modifications is indicated in the Report itself, which points out that while a land force is usually able to seize an undefended place and carry out any necessary destruction of stores, etc., without resorting to bombardment, a naval commander may sometimes find it impossible to do so, either because he cannot spare a landing party or because he is obliged to withdraw rapidly.² Generally speaking, a land commander should have no need to resort to bombardment in the cases mentioned in the Articles quoted above; he could destroy military storehouses, etc., or enforce requisitions by other methods. But if, for some reason, it were impossible for him to send a force to seize an undefended town and destroy its military establishments, and to carry off the provisions or stores which the inhabitants refused to supply on his requisition, then military necessity would justify him in following the rules laid down for the bombardment by a naval force.

In connection with Article IV of the rules for naval bombardment, given above, it may be noted that in the British *Official Laws and Customs of War*, Professor Holland lays down the rule that "a place must not be bombarded with a view merely to the exaction from it of a ransom," and the rule forbidding bombardment on account of failure to pay a money contribution may also be accepted as a usage obtaining in land no less than naval war. Early's destruction of Chambersburg in 1864,³ and the bombardment of Puente by the Chilian naval commander, Captain Lynch, in 1880,⁴ are two instances of refusals to comply with demands for money contributions being visited with ruthless punishment. No civilised belligerent would follow these precedents to-day. The French Admiral

Bombardment to exact ransom prohibited.

¹ Blue Book, *Protocols of the Eleven Plenary Meetings of the 2nd Peace Conference* (Cd. 4081, 1908), which I shall refer to as "Hague II B.B. (A)," p. 113.

² Hague II B.B. (A), pp. 115, 117.

³ See p. 131, *supra*.

⁴ Markham's *War between Peru and Chile*, p. 216.

Aube recommended in 1882 that armoured fleets should, in future wars, descend upon the enemy's commercial ports and hold them mercilessly to ransom;¹ his Government dissociated itself from this view, which is now dismissed from practical politics by the Hague Convention of 1907.

Three cases in which undefended towns may be bombed.

As war law stands one may say that an undefended city, unoccupied by troops and not situated within the perimeter of defence of a neighbouring fort or forts, may be bombarded in land war only in *three* cases and in those three cases only *if it is absolutely impossible to obtain the end in view by milder means*: the three cases being:—

1. the destruction of military stores, factories, etc.;
2. to secure compliance with legitimate requisitions;
and
3. a very doubtful case—to inflict punishment, by way of reprisals, for infractions of the laws of war on the part of the enemy.²

Destruction, even by bombardment, always legitimate as a measure of tactical necessity.

“Article XXV is not to be interpreted as prohibiting the destruction, by any means, of any buildings whatever, when military operations necessitate such destruction.” This statement was made by the German Military Delegate at the Hague in 1899, and was not questioned by any of the other delegates.³ It is reproduced in the British Manual⁴ and the German *Kriegsbrauch im Landkriege*.⁵ It follows, indeed, from the general war right of destruction with which I have dealt in the last chapter. The necessities of the defence of a position may justify the destruction of a house, a street, a village in its vicinity; and there is nothing, of course, to prevent that destruction being effected by artillery—the inhabitants being first removed.

¹ Hall, *International Law*, p. 431.

² See Holland, *Studies in International Law*, p. 110, who gives these three cases as those in which the Committee of the Institute of International Law decided, in 1896, that an undefended town could be bombarded, except that under (2) he includes contributions. The third case—punishment for breaches of war law—was not approved by the Institute itself as one in which bombardment would be justifiable.

³ Hague I B.B. p. 146.

⁴ Holland, *Laws and Customs of War* (Official), p. 30.

⁵ Page 21.

Article XXVI provides for warning being given of an intended bombardment, "except in cases of assault." By "assault" (*attaque de vive force*) is meant a surprise attack.¹ All military operations, both offensive and defensive, are much more likely to be successful if they partake of the character of a surprise,"² and the general rule which enjoins warning must be overridden where there are military reasons against it. Ordinarily, however, a bombardment would not be in the nature of a surprise attack and the rule as to warning was pretty generally accepted even before the Hague Conference of 1899. Hood and Sherman had a passage of words in 1864 on the subject of the necessity for giving notice of a bombardment. Sherman shelled Atlanta without warning and Hood protested against his action, on the ground that notification was "usual in war among civilised nations." Sherman replied:—

I was not bound by the laws of war to give notice of the shelling of Atlanta, a fortified town, with magazines, arsenals, foundries [sic], and public stores; you were bound to take notice. See the books.³

Sherman's contention is hardly borne out by the *Instructions* of the Government he was serving. Article 19 of the *American Instructions* lays down:

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

There was no question of a surprise attack at Atlanta, which was then full of non-combatants, and Sherman's view, as expressed in his quotation, cannot be reconciled with the principle laid down in this article. The same position was adopted by Bismarck in 1870, when he refused to give notice of the bombardment of Paris. The French Foreign Minister

¹ Brussels B.B. pp. 196, 285.

² British *Field Service Regulations*, Part I, *Combined Training*, sec. 108.

³ Sherman, *Memoirs*, Vol. II, pp. 121, 128.

protested against the German authorities' action, in a circular addressed to the neutral Cabinets, in which he said :

The besieger is bound to announce beforehand his intention to bombard, in order to give time for non-combatants, women and children to be removed. There was no necessity for a bombardment without previous notice.¹

That this reading of the usage of war was the accepted one is shown by the fact that it was supported by all the foreign diplomatic agents in Paris, who protested against the omission of a notification.² But Bismarck maintained that a fortified and beleaguered city ought to be prepared for bombardment and that neither law nor custom required a warning to be given,³ and this position is still adopted in the German official manual, *Kriegsbrauch in Landkriege*, which lays down that warning is unnecessary.⁴ So far as a surprise attack is concerned, the German view may be admitted, and it is also true in the case of a bombardment of forts or strongholds in which there are no non-combatants present. "Notification of bombardment," says Professor Le Fur, "cannot be insisted upon in the case of detached forts, coast batteries, or fortified works separated from towns. . . . The garrison which occupies them is bound to be on its guard from the moment of the declaration of war."⁵ The Greeks gave no warning before their bombardment of Prevesa in 1897, but as they fired only on the fort, their action is supported by M. Politis as justifiable.⁶ When, however, the place threatened with bombardment is one containing non-combatants, and especially women and children, considerations of humanity (to say nothing of the very definite Hague regulation) clearly render a warning desirable. Bluntschli, a State-paid professor, has not hesitated to contradict the German Chancellor's contention that there is no usage or law enjoining

¹ Quoted, Cassell's *History*, Vol. II, p. 194.

² Pillet, *op. cit.* p. 108.

³ Cassell's *History*, Vol. II, p. 194; Hozier, *Franco-Prussian War*, Vol. II, pp. 133, 258; Busch, *Bismarck*, Vol. I, p. 185. At Strasburg, however, General von Werder warned General Ulrich when the bombardment was about to commence (German Official *History*, Part I, Vol. II, p. 447).

⁴ *Op. cit.* pp. 19, 20.

⁵ *R.D.I.* September-October, 1898, p. 777.

⁶ *Ibid.* September-October, 1897, p. 687.

it,¹ and the jurists of all nations agree. Notification of a bombardment has now become the rule. Witness the bombardment of Madagascar by the French in 1895;² of Manila and Santiago by the United States in 1898;³ of Kimberley in 1899;⁴ of Port Arthur in 1904.⁵ San Juan was bombarded in 1898 without notice, although Admiral Sampson had spoken of "due notice" being required, in a despatch addressed to the Navy Department at Washington a short time before.⁶ As to the time which ought to be allowed between warning and bombardment, no fixed period is laid down. At the Brussels Conference one of the delegates suggested that a delay between the warning and the attack should be provided for; the President pointed out that "the warning, by its very nature, implies the idea that it may be utilised."⁷ Different periods of delay were granted by the United States authorities in the Cuban and Philippine bombardments in 1898. At Santiago, Shafter's first demand for surrender (3rd July) gave about twenty-four hours' notice, but no bombardment followed this demand, and his second demand, of the 6th July, gave the Spanish Commandant three days' respite, to enable him to communicate with Havana and Madrid; when Washington rejected the Spanish proposals for surrender, Shafter's final warning gave less than twenty-four hours' notice.⁸ At Manila, Dewey and Merritt gave the Spanish Captain-General forty-eight hours' notice of the intended bombardment.⁹

No fixed
"period of
grace."

¹ Bluntschli, *op. cit.* sec. 554. He says: "Even when it is a case of fortified places, humanity requires that the inhabitants should be warned of the moment of opening fire, whenever military operations allow. It is only in the most urgent cases that a sudden attack, combined with immediate bombardment, appears to be authorised by military necessity."

² Pillet, *op. cit.* p. 108.

³ Titherington, *op. cit.* pp. 267, 305, 371-4.

⁴ *Times History*, Vol. IV, p. 545. On 20th October, 1899, Cronje notified Baden-Powell that he would begin to shell Mafeking on the 23rd at 6 a.m., but the bombardment had been actually begun on the 16th.

⁵ Ariga, *op. cit.* p. 275. In 1894, Japan promised not to bombard Wei-hai-wei and Chefu without giving notice (two days in advance), *R.D.I.* September-October, 1898, p. 777.

⁶ Titherington, *op. cit.* p. 165; *R.D.I.* September-October, 1898, p. 778.

⁷ Brussels B.B. p. 285.

⁸ Titherington, *op. cit.* pp. 267, 305-6.

⁹ *Ibid.* p. 371.

It would be difficult to lay down any rigid rule as to the period of grace that ought to be allowed. The main thing is to give a reasonable time to the non-combatants to provide for their safety. A perfunctory warning, or a belated warning, such as Cronje gave at Mafeking in 1899, four days after the first shell had been fired, is no warning at all.

Question
of allow-
ing exit
to non-
com-
batants
before
bombard-
ment.

"The besieger," says Professor Holland in his note to this Article in the British Manual, "is under no absolute obligation to allow any portion of the population of a place to leave it, even when a bombardment is about to commence."¹ "The free passage of 'useless mouths' (*des bouches inutiles*)," says De Martens, "might lead to the indefinite prolongation of the siege of an important place and compromise the military combinations which are based on its immediate capture."² On the other hand, to refuse exit to the non-combatants of a town which it is proposed to reduce by bombardment or assault, and not by famine, is to inflict unnecessary suffering on persons who are protected by the laws of war. The question was raised at the Brussels Conference, when the German and Italian representatives wished it to be declared that—

Should the defender of a fortified place turn out the inhabitants in order to husband his resources with the view of prolonging the defence, a measure which might be justified by military requirements, the besiegers may, without violating the laws of war, refuse a free exit to such inhabitants, and that in such a case the besieged shall be obliged to allow them to re-enter the place.³

"The position of these unfortunate people would be cruel if the besieger refused them, which, if he did not wish to help the tactics of his adversary, he would be bound to do." Unfortunately, the French delegate obtained the withdrawal of the proposition, on the ground (by no means borne out by history) that such a case was improbable, and no decision was

¹ *Laws and Customs of War*, p. 30. The French *Manuel* states that the besieger "will do well" to consent to the non-combatants leaving, if his siege operations allow of it (p. 24).

² De Martens, *op. cit.* p. 397.

³ Brussels B.B. p. 196. Bluntschli lays down the rule (*op. cit.* sec. 553) that "the besieger may, without violating the laws of war, refuse free passage to the expelled inhabitants of the town, and in this case the besieged is bound to allow them to return." See also *American Instructions*, Article 18.

given.¹ Modern wars furnish instances both of the grant and of the refusal of leave to depart in such circumstances, but there is no doubt that a usage is growing in favour of allowing free exit. In 1810, when the Spanish Commandant of Lerida expelled some thousands of non-combatants from the town, the French Marshal Suchet received them with a storm of grape-shot, drove them into the citadel, and shelled them there all night.² Compare with this the permission given by the Mikado in 1904 to the non-combatant residents of Port Arthur to leave the fortress before the bombardment commenced, and the advance that has taken place in this department of war usage can be appreciated.³ The magnanimous offer was declined by the Russian authorities, but it is to the credit of Japan and of civilisation that it should have been made. The German Germans, never disposed to forgo the full measure of their German practice. bond in any question of war rights, adopted a rigorous and inhumane attitude, for the most part, towards the civil populations of the French cities in 1870. At Paris they allowed several hundred women and children to cross the lines in October,⁴ but at St. Denis, at Thionville, at Péronne, they refused to let non-combatants leave the threatened cities.⁵ They also refused at first at Strasburg,⁶ but subsequently allowed some delegates sent by the Swiss Federal Council to remove about 2,000 women and children, who had been rendered homeless by the bombardment, to Switzerland.⁷ The besiegers took down a barricade to let the emigrants through their lines,

¹ Brussels, B.B. p. 199.

² De Martens, *op. cit.* p. 196; T. D. Woolsey, *International Law*, p. 232; Farrer, *Military Manners and Customs*, p. 21.

³ Ariga, *op. cit.* p. 275 ff; D. H. James, *The Siege of Port Arthur*, pp. 46-7; Kinkodo Company's *History*, p. 548.

⁴ Cassell's *History*, Vol. I, p. 435.

⁵ St. Denis, see Cassell's *History*, Vol. II, p. 245; Thionville, see German Official *History*, Part II, Vol. II, p. 29; Péronne, *ibid.* p. 252.

⁶ Before the bombardment General Ulrich asked permission to send the women, children, and aged out of the town—a "wish which was too much in opposition to the assailant's interests to be conceded" (German Official *History*, Part I, Vol. II, p. 447).

⁷ General von Werder subsequently withdrew the permission to leave the city, as the original emigrants endeavoured to excite, from Bâle, resistance against the German troops in Upper Alsace (German Official *History*, Part II, Vol. I, p. 77).

and General Uhrich allowed two hours' armistice for the reconstruction of the barrier after they had passed through.¹ At the siege of Metz an incident occurred in connection with an attempted exodus of non-combatants which attracted a good deal of attention at the time. Some thousands of peasants presented themselves before the German outposts under a flag of truce and endeavoured to pass through the investing lines. They were ordered to turn back but disobeyed, and shots were fired over their heads to intimidate them. These had no effect, and a male peasant, who led the way with a flag of truce, was therefore fired at and wounded. Upon his fall, the rest turned and fled back to Metz.² It would have been fatal to the German policy of starving Metz into surrender to have allowed such a wholesale exodus as was attempted and one cannot see how they could have acted otherwise than they did. The Instructions for the guidance of the Japanese troops investing Port Arthur, drawn up by the legal counsellors and distributed to the corps on the 8th August, 1904 (the Mikado's offer was not communicated until 16th August), forbade the troops to relax their fire in the event of the Russians despatching women and children from the city with the object of appealing to the compassion of the Japanese; "they should not, however," said the order, "be fired upon intentionally."³

Japanese
practice.

The most humane commander cannot allow a body of non-combatants, even women and children, to endanger the success of his operations by an appeal to his pity. Still less will he be disposed to allow combatants to do so. At Metz, "the number of Frenchmen brought in daily by the German outposts became so large that Prince Frederick Charles instructed the Generals in command not to receive more deserters than was absolutely necessary in order to obtain information."⁴ On one occasion, no less than 800 deserters presented themselves; they were sent back to the fortress.⁵ No fault can be found with the Red Prince for declining to assist Bazaine to rid himself of

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 64.

² *Daily News War Correspondence*, pp. 359-360; Cassell's *History*, Vol. I, pp. 282-4; Hozier, *Franco-Prussian War*, Vol. II, p. 118.

³ Ariga, *op. cit.* p. 274.

⁴ German Official *History*, Part II, Vol. I, p. 199.

⁵ Hozier, *Franco-Prussian War*, Vol. II, p. 118.

useless mouths in order to husband his food supplies; but it was a very different matter when the inhabitants of villages outside Metz were driven into the town. An English correspondent who was in Metz during the siege and who has left an invaluable record of its incidents, relates how the Prussians drove such inhabitants into the town and, when the poor creatures tried to return to the Prussian lines, fired over their heads—or even at them, for some were hit—and drove them into the town again.¹ If a besieger, relying on starvation as one of his weapons, is not bound to let the besieged diminish the numbers he has to feed by expelling some of them, the besieged for his part cannot fairly be forced, out of commiseration for his unfortunate fellow-countrymen, to add to his “useless mouths” and lessen *pro tanto* his chance of successful resistance. In equity the *status quo* at the beginning of the siege ought to be maintained. What the Prussians did at Metz was attempted on a smaller scale in 1899 by General Burger, who tried to force some 230 British-Indians, who had come from the Transvaal, upon the Ladysmith garrison.

Irregular
action of
Germans
at Metz;

and of the
Boers at
Lady-
smith.

White had previously taken in the Dundee wounded and some 200 refugee coolies from that place, but so barefaced an attempt to weaken his powers of resistance by imposing on his humanity was too much. When pressed, Burger conceded the point and allowed the Indians to go south.²

At the siege of Kars in 1877, the Russians forced the inhabitants of the village of Tchiflik to retire into the fortress, but the circumstances were different from those at Metz. The village lay between the siege batteries and the fortress, and, as a tactical measure, the Russians decided that the villagers must either go outside the Russian lines or into the town. They refused to do either and furthermore acted in such a way as to create the suspicion that they were guilty of espionage. They were therefore driven into the fortress.³

The great siege of Plevna in 1877 furnishes another instance of a besieger refusing exit to his enemy's non-combatant nationals. When Osman Pasha's food supplies began to fail, he

Exit
refused to
non-com-
batants at
Plevna.

¹ G. T. Robinsun, *The Betrayal of Metz*, p. 316.

² *Times History*, Vol. III, p. 163.

³ De Martens, *op. cit.* p. 401.

turned out the old men and women who were in the town and demanded free passage for them to Sofia or Rakhovo. General Gourko refused and sent them back.¹ He could not do otherwise without detriment to his plans. On another occasion during the same siege, an individual woman tried to pass through the Russian lines; she was driven back into Plevna by Cossacks with whips.² One can hardly quote the Boer war of 1881 for precedents on questions of International Law, but an incident of that war is rather instructive as showing how an astute belligerent, unbound by military traditions, will naturally adopt the very practice which has become part of war usage. When Potchefstroom was besieged the Boer commander gave permission to the women and children to leave the fort where the English troops held out. At this stage, apparently, it was not thought that the fort could be reduced by famine; subsequently when the garrison's food supplies were known to be running short, permission to leave was requested for some ladies who had not availed themselves of the original permission, but the Boers would not accede to the request.³ In the Spanish-American war, the United States troops not only allowed the non-combatants in Santiago to leave the city before the bombardment, but they provided food for the starving fugitives who passed in a great stream through the investing lines.⁴ What makes it so difficult to decide how to treat the inhabitants of besieged towns in this matter of granting passage is that commanders have not been able to find any means of reconciling the opposing interests of military necessity and of humanity. However, in the last Boer war an excellent expedient was hit upon, in the shape of the "neutral" camp at Intombi near Ladysmith, which solved the difficulty I have referred to. Generals White and Joubert arranged that this camp should be used exclusively by the sick, wounded, women and children of the town, from which their rations were conveyed daily, and there they remained unmolested during the siege. By this means it was secured that the British commissariat department

Exit
allowed in
Spanish-
American
war.

Compro-
mise at
Lady-
smith.

¹ De Martens, *op. cit.* p. 401.

² V. L. Nemirovitch-Dantchenko, *Personal Reminiscences of General Skobelev*, p. 155.

³ *The Transvaal War, 1880-81*, edited by Lady Bellairs, p. 255.

⁴ Titherington, *op. cit.* pp. 267, 295-6; Atkins, *The War in Cuba*, p. 171.

was not relieved of the duty of finding food for the non-combatants, while the latter were protected from the dangers of the bombardment.¹ Commandant Wessels at Kimberley was even more chivalrous, if less ingenious, than Joubert at Ladysmith. Before he began the bombardment, he suggested to Colonel Kekewich that all the women and children should be sent out of the town; he offered to receive Afrikaner families in his own camp, and to grant free passage to all others. Kekewich accepted the offer so far as the Afrikanders were concerned, but declined it for the others, and, for some reason, the receipt of the offer concerning the European families was not made generally known. *The Times* historian surmises that the reason for the concealment of Wessels' offer from the British and Colonial population was that the purport of his letter was not understood, owing to an imperfect knowledge of Dutch on the part of Kekewich's staff. But General Maurice gives as the reason Kekewich's lack of transport for families other than Afrikaner and the fact that the publication of the letter might have caused unnecessary alarm in the town.² When Cronje was cornered by Lord Roberts at Paardeberg, it was not at first known to the latter that there were women and children present in the Boer camp. When he discovered it, he sent a chivalrous and notable letter to Cronje, in which he expressed regret that the women and children should have been exposed to the British fire and offered to grant them a safe-conduct through his lines. This offer Cronje curtly declined. Next day he repented and proposed that Lord Roberts should supply him with a complete hospital equipment, which he would graciously allow to be erected to the west of the laager. As the *History* of the Berlin Great General Staff points out, this suggestion of Cronje's was "an extremely crafty artifice, for the Boers would then have been safe from an attack on their

Exit
allowed at
Kimber-
ley.

Free
passage
offered at
Paarde-
berg.

¹ *Times* History, Vol. III, pp. 157-8; Maurice, *Official History*, Vol. II, p. 541.

² *Times* History, Vol. IV, pp. 545-6; Maurice, Vol. II, p. 57. Only five Afrikanders availed themselves of the liberty to depart; but afterwards, when it became known, from a captured Boer paper, that the general offer had been made, some of the inhabitants found ready fuel for a grievance in the concealment of an offer which they would probably have declined at the time it was made (*Times* History, *l.c.*).

most dangerously exposed side." Lord Roberts, in his final reply, regretted that if his original offer were not accepted, he could not make another.¹ He had done all and more than all that chivalry and generosity demanded, and it was assuredly no fault of his if the Boer women and children had to endure the horrors of the bombardment of the succeeding days, when sixty guns poured a converging fire upon the cramped laager where the burghers stood at bay.² An American war correspondent who was with the Boers states that the women in the laager helped the men to dig the trenches and used carbines, which may account for Cronje's reluctance to let them go.³

Passage
offered at
Port
Arthur,
1904.

I have already said something of the offer made by the Mikado to certain of the inhabitants of Port Arthur in 1904. Protection was promised to women, children, priests, diplomats, and military and naval attachés of neutral Powers. Young people of under 16 years were included in the term children. The persons mentioned were directed to present themselves, under the white flag, at the Japanese outposts at a certain hour, and they were permitted to take with them a single bundle or package of ordinary size, which was not, however, to contain any written documents, etc., relative to the war. The offer was declined by the Russian authorities in Port Arthur, who said that "they did not find it possible" to take advantage of it.⁴ It seems to be a general experience in the case of towns threatened with bombardment that the inhabitants make light of the danger and deprivations until these evils are actually present and it is too late to escape from them.

Churches,
hospitals,
etc., not
to be bom-
barded.

Article XXVII provides that buildings devoted to religion, art, science, and charity, and hospitals and lazarettos, shall, as far as possible and on condition that they are not used for military purposes, be spared in bombardments. The besieged must notify his adversary of such buildings, which are to be

¹ The Correspondence is given in the *German Official Account of the War in South Africa* (authorised translation by Colonel Waters), pp. 262-4; see also Maurice, *Official History*, Vol. II, pp. 162-3; *Times History*, Vol. III, pp. 478-9.

² See Conan Doyle, *Great Boer War*, pp. 335 ff. for a description of the fighting at Paardeberg.

³ Howard C. Hillegas, *With the Boer Forces*, pp. 288-9.

⁴ Ariga, *op. cit.* pp. 276-9.

indicated by a special sign. What this sign is to be, is not stated. For naval bombardment a stereotyped sign is laid down in the Convention—viz., “large, stiff, rectangular panels, divided diagonally into two painted triangular portions, the upper portion black, the lower portion white.”¹ In land war, the flag or sign would have to be specially arranged between the belligerents. The hospitals referred to in this article are civil hospitals, not the military hospitals which are protected by the Geneva Convention. It appears to be usual, however, to hoist the Geneva flag with the Red Cross over such hospitals in bombarded cities, but this practice is now implicitly forbidden by Article 21 of the Geneva Convention of 1906.²

There is hardly any siege of modern times in which some complaint about the shelling of the hospitals has not been made. Trochu and von Moltke waxed hot on the subject at Paris in 1871. Trochu complained that the Prussian fire was persistently directed in such a line and at such an angle as to strike the “hospitals immemorially consecrated to the public weal,” such as la Salpêtrière, le Val-de-Grâce, etc., and to endanger the lives of the children, women, and incurables therein; and he requested that orders should be issued by the Prussian authorities to ensure to these asylums the respect due to the flags displayed on their domes. In reply, Moltke emphatically protested against the insinuation that the hospitals were deliberately shelled; the damage done to them was accidental and even this would be avoidable as soon as a clearer atmosphere and shorter ranges allowed of the recognition of the flags on the buildings.³

The shelling of the Paris hospitals in 1870-1.

It is inconceivable that the high military authorities of the investing armies can have sanctioned the shelling of the hospitals, but it is quite possible that some of the gunners may have used the lofty domes and buildings, all the more prominent for the flags they flew, to range their fire. Sir William Russell, a German sympathiser, wrote from Versailles to *The Times* on 8th February, 1871:

I am informed that a special fire is likely to be directed against the Invalides, the dome and front of which form very conspicuous

¹ Hague II B.B. p. 116.

² See Bonfils, *op. cit.* sec. 1085.

³ German Official *History*, Part II, Vol. II, Appendix 148.

marks in the landscape of Paris as seen from the plateau of Meudon. This information comes from Prussian officers.¹

It is remarkable, too, that the hospital of the Val-de-Grâce, which had come in for an unpleasant share of the German gunners' attentions—of malice, said the French, owing to the fogs, said the Germans—was left quite unmolested from the day when General Trochu declared that he would transfer to this hospital the German wounded prisoners of war.² The artilleryists' aim was, no doubt, impeded by the heavy smoke from the old black powder, as it was at Sebastopol, where a hospital was struck by a shell and burnt.³ It may have been, too, that the Paris hospitals were so scattered through the city as to make it difficult to avoid hitting them. The Turks complained that the Russian gunners shelled the hospitals in Rustchuk in 1877, but De Martens points out that this was quite unavoidable.

Hospitals must not be so localised as to make bombardment impossible.

They had organised some hospitals flying the Red Crescent in the centre of the town, so that, to spare the privileged places, the Russians would have had to renounce every act of hostility.⁴

At Santiago, too, in 1898, it is said that "one whole quarter of the town facing the American lines seemed to be stuck all over with hospital flags, so that if it came to even the most legitimate form of bombardment the hospitals would inevitably be struck";⁵ and the city generally appears to have fairly bristled with white flags, claiming protection for missions. A besieger has certainly the right to demand that a fortified city shall not be so studded with hospitals as to make bombardment impracticable. He cannot, indeed, claim, as Cronje did at Mafeking, that only one building shall be neutralised⁶—there is no authority in conventional or uncoded war law for such a claim—but he can claim that the privileged buildings shall not be so numerous and so disseminated as to prejudice his general war right of bombardment. As Sir Henry Maine observes, "the most abundant good faith should be used in the

¹ Quoted, Cassell's *History*, Vol. II, p. 194.

² Pillet, *op. cit.* p. 112.

³ Russell, *Crimea*, p. 220.

⁴ De Martens, *op. cit.* p. 400.

⁵ J. B. Atkins, *The War in Cuba*, p. 163.

⁶ See Article by M. Arthur Desjardins in *Revue des Deux Mondes*, 1st March, 1900, p. 52. He says Cronje's contention was "too narrow an interpretation of the Convention [of Geneva]."

localisation and use of these beneficent mitigations of the hardships of war.”¹ The question of localisation was raised at the last siege of Port Arthur, together with another of equally great interest. General Stoessel complained that the hospitals were being shelled and a meeting was arranged between representatives of the Japanese and Russian staffs, to settle the measures which ought to be taken to safeguard the buildings. As a result of this conference, a map showing the situation of the hospitals was forwarded to the Chief of the Japanese Staff, who acknowledged its receipt in a letter containing the following words:—

Availing myself of this opportunity, I have the honour of explaining to you, once for all, the position we take with regard to placing the hospitals out of danger during the bombardment.

(1) As stated in the letter of General Baron Nogi to his Excellency General Stoessel, dated 16th inst., the Japanese army does not under any circumstances range its artillery intentionally against hospitals displaying the sign of the Red Cross, but as the buildings marked on the plan as hospitals are situated in the midst of, or quite close to, those which we deem it essential to bombard, we cannot be absolutely certain that the shells will not touch them by accident owing to the deviation of our ordnance.

(2) As declared by the delegate of our army in the negotiations of the 16th inst., the fact of our receiving the plan does not imply our acceptance of the obligation of not firing intentionally upon the buildings marked as hospitals. We reserve the right to range our guns on such of these buildings as come under the following cases:—

(a) If we are informed or have observed directly that a particular building is not actually used as a hospital;

(b) If we learn by the same means that there is a violation of the Geneva Convention with regard to a particular building, although it is being actually used as a hospital.²

In the above minute, in which Professor Ariga concurred, two distinct points are brought out, both of great interest and importance for future bombardments. First, if the besieged choose to establish hospitals in dangerous proximity to buildings containing war *matériel* or supplies, it is he and not the besieger who is chargeable with any damage incidentally caused to the former by the legitimate bombardment of the latter. The

¹ Maine, *International Law*, p. 159.

² Ariga, *op. cit.* p. 292.

Minute
of the
Japanese
Chief of
Staff in
1904.

besieger is bound to spare hospitals, etc., "as far as possible." He must not be deprived of his war right of bombarding a defended city, and especially its warlike stores and such like, as a result of the defender's localisation of his hospitals. Secondly, the fact that a building flies the Geneva flag does not exempt it from attack if it is known, by conclusive evidence, to be used for a warlike purpose. It will be noticed that the Japanese proposed, in such a case, to shell the misapplied hospital straight away—not to request the Russian commandant to see that it was properly used. The latter course might waste precious time, to the prejudice of the besieger's interests, and the very fact that a building, which is really subject to bombardment, is falsely represented as privileged and exempt, by the hoisting of a lying flag, is in itself an additional reason for shelling it: provided, of course, the misapplication be quite beyond doubt. Deliberately to shell a hospital, used solely as such, is a grave breach of the laws of war. General Schalk Burger concentrated shell-fire on the town hall at Ladysmith, because the British had already a hospital at Intombi camp and he concluded, by some peculiar process of reasoning, that the town building must therefore be used for some illegitimate purpose, such as the storage of ammunition. As a matter of fact, it was used, properly and naturally, as a temporary hospital—a kind of clearing hospital—but Sir George White, who had other controversies with the Boer General about this time, adopted the line of least resistance in this question of the hospital and simply moved it from the town-hall to a ravine out of the line of fire.¹

War
rights re-
lating to
the
immunity
of
churches:

(1) they
must not
be occu-
pied;

The burning church is as much an essential feature of the conventional battle-picture as the impossible, prancing general waving a sword of no known scaled pattern. No sane belligerent would, it is needless to say, waste good shell on an innocuous church, but if his enemy choose to take up his quarters in or near one, then it entirely loses its privileged character and becomes simply a defended building. Churches have been battered to pieces ere this by the most devout commanders. In the bloody fight at Aspern, the church "was made

¹ *Times History*, Vol. III, p. 162; see H.H.S. Pearce's *Four Months Besieged*, pp. 89 ff.

in turn to act as a citadel for both sides. It was almost the only part of the village left in the possession of the Austrians at the end of the first day's fighting, and after again changing hands on the second day, the Austrian commander finally ordered the wall of the yard to be pulled down and the church itself burnt, to deprive the French of its shelter if they again recaptured the village."¹ At Froeschwiller village, where was fought the battle of Woerth, "the church was shelled and then burnt down after a fearful hand-to-hand combat had taken place within its walls."² The church at Gravelotte was also the centre of a desperate struggle, and after the battle its defenders lay heaped on the floor and round the altar.³ In the village of Nouilly, outside Metz, the very ancient and beautiful church was, says the *Daily News* correspondent, "pounded with shells more severely than any building I have ever seen. The French pelted it on one side, the Prussians on the other."⁴ One of the fiercest encounters in the sorties from Metz raged round a convent and church of the Sisters of Providence, between Metz and Peltre. "Their church became a charnel-house; the very sanctuary was stained with blood, and the house of mercy was turned into the house of vengeance. The Prussians craved, the French gave, no quarter, and flight there was none."⁵ At the battle of Caney (1898), the Spaniards maintained a desperate resistance from the security of a stone church, the walls of which were loopholed for rifle fire.⁶ If a commander of a (2) nor besieged town uses a church as a stronghold (as the British used for troops did at Wakkerstroom in 1881),⁷ or as a store-house for warlike purposes, ammunition or military stores) (as Osman, devoutest of Mahomedans, used the Plevna mosques),⁸ or as an observatory for defence purposes (as the Prussians alleged that the French used the Cathedral towers at Metz, Strassburg, and Toul),⁹ the besieger has certainly a right to shell the building. And he is not

¹ Clery, *Minor Tactics* (1880), p. 272.

² Hozier, *Franco-Prussian War*, Vol. I, p. 317.

³ *Daily News War Correspondence*, p. 314.

⁴ *Ibid.* p. 239.

⁵ Hozier, *Franco-Prussian War*, Vol. II, p. 109.

⁶ Titherington, *op. cit.* p. 236.

⁷ Bellairs, *Transvaal War of 1880-81*, p. 355.

⁸ W. V. Herbert, *Defence of Plevna*, pp. 282, 310.

⁹ G. T. Robinson, *Betrayal of Metz*, p. 169; *Kriegsbau im Landkriege*, p. 20; Cassell's *History*, Vol. I, p. 197.

responsible for damages caused to churches and the other kinds of buildings referred to in article XXVII, through their proximity to buildings which are subject to bombardment. Over and over again churches, monuments, artistic and scientific institutions, have suffered in bombardments, and it is impossible to say whether the damage could have been avoided. The Petersburg churches were hit by the Federal shells in 1864-5 and had to be closed.¹ In the Franco-German war, the Abbey of St. Denis was knocked to pieces by 200 shells;² the beautiful cathedral of Strassburg was badly damaged;³ the Gothic chapel of St. Gengoulph at Toul (dating from 814 A.D.) was ruined;⁴ the churches of Longwy,⁵ Péronne,⁶ and Bitsche,⁷ were made heaps of stones and rubbish; not only the Invalides and the hospitals, but the Sorbonne, the Panthéon, the School of Law, and the Garden of Medical Botany were shelled during the bombardment of Paris.⁸ The French themselves shelled the splendid palace of St. Cloud, which was occupied by a number of Prussian officers during the investment.⁹ But the outstanding instance of destruction of this kind is that of the Library at Strassburg, when 400,000 volumes and 2,400 manuscripts were destroyed by the German cannon.¹⁰ It is hardly a fanciful anticipation to say that this great world-loss will make the war of 1870-1 memorable when the politics which led to it, and the names of its battles, and leaders, are forgotten. One can conceive, perhaps dimly, how it will be regarded by some future generation, in whose eyes war is nothing but a long discarded folly, like "trial by battle" in ours,—one of the childish things which nations put off when they came to manhood. It will be a wit-mark to such a distant generation, a thing for wonder and

Shelling of
buildings
devoted to
art and
science.

¹ Captain R. E. Lee, *Recollections and Letters of General R. E. Lee*, p. 134.

² Bonfils, *op. cit.* sec. 1085, note.

³ Hozier, *Franco-Prussian War*, Vol. II, p. 70; Edwards, *op. cit.* p. 183

⁴ Cassell's *History*, Vol. I, p. 198.

⁵ Hozier, *op. cit.* Vol. II, p. 229.

⁶ Edwards, *op. cit.* p. 183.

⁷ Cassell's *History*, Vol. I, p. 200.

⁸ Bonfils, *op. cit.* sec. 1085, note; Hozier, *op. cit.* Vol. II, p. 258.

⁹ Cassell's *History*, Vol. I, p. 381.

¹⁰ Bonfils, *op. cit.* sec. 1085, note. Sir Henry Hozier says of the burning of the library—"Since the apocryphal burning of the library of Alexandria, perhaps no equally irreparable loss has occurred." (*Franco-Prussian War*, Vol. II, p. 71).

pity, and to provoke the sense of complacent superiority, that men could actually once have given the priceless treasures of the Strassburg Library to the flames as a mere incident of their egregiously stupid methods of settling their international disputes.

In their war with Russia, the Japanese took especial care to spare the imperial mausoleums and sacred towns of Manchuria. But they had perforce to shell Liao-yang, as the enemy had constructed defences around it and offered a determined resistance. After its capture, however, an order was issued to the troops that they were not to enter the town without a special pass, and if any considerable bodies wished to inspect the monuments, they were to do so under the supervision of an officer, who was not to allow them to break ranks.¹ After the battle of Mukden, the 53rd Reserve Regiment of Infantry was specially commissioned to protect the mausoleum of Yung-Ling.² The town of Mukden itself was saved from damage through the action of the Japanese authorities in persuading the 1,100 Russian soldiers, who held it after the great battle, to lay down their arms, and the Japanese troops were strictly forbidden to take up quarters in the town.³ The Chinese Government was so impressed and grateful for the care which the Japanese took to protect the town and imperial palace of Mukden—the “Moscow” of China—that it allowed the professors of the Tokio University access to the monuments and the imperial library of the city, for the purpose of scientific and historical research. Professor Ariga remarks that “it was one of the most agreeable remembrances which he brought back from the theatre of war, that he was able, during his leisure from his professional duties, to take part in this study.”⁴

The destruction of the Summer Palace at Peking in 1860 and that of the Mahdi's Tomb at Omdurman in 1898 were deliberate acts of policy, intended in the one case to awe the Chinese into respect for the British power, in the other to remove a constant and tangible source of incitement for the fanatical dervishes. These cases hardly come within the purview of the war law governing civilised conflicts, and one need

Care of the Japanese for sacred buildings in 1904-5.

Destruction of historical and sacred buildings as an act of policy.

¹ Ariga, *op. cit.* pp. 476-7.

² *Ibid.* p. 478.

³ *Ibid.* pp. 480-3.

⁴ *Ibid.* pp. 484-5.

not, therefore, inquire too closely into Lord Wolseley's justification of the earlier destruction. ("They might style us barbarians if it pleased their vanity to do so, but we felt that for all classes to recognise fully our superior military strength would be the surest guarantee of peace in the future"); nor, on the other hand, into Mr. Winston Churchill's condemnation of the profanation and destruction of the Mahdi's Tomb.¹ The deliberate shelling of historic monuments is a wanton outrage on civilisation as well as a clear breach of war law. When the French under Oudinot besieged Rome in 1849, they were careful to spare the monuments and art treasures in their bombardment, although the Cardinals, it is said, pressed for an unsparing bombardment. Their treatment of the Imperial City compares very favourably with that accorded to Venice by the Austrians in the same year; the latter city was bombarded with red-hot balls from high-angle guns and a great destruction of churches, hospitals, and priceless frescoes resulted.²

Pillage.

Article XXVIII forbids the pillage of a town or *locality* (*localité*), even when taken by assault, and Article XLVII expressly forbids pillage generally. The two articles may conveniently be considered together. Professor Holland's note to the later article, in the British Manual, defines pillage, or loot, as "booty, which is not permitted," and refers to section 6 of the Army Act, which prescribes the death penalty or any less punishment for the following offences committed by a soldier on active service:—

- (1) leaving his commanding officer to go in search of plunder;
- (2) committing any offence against the property or person of any inhabitant of or resident in the country in which he is serving;

¹ For the burning of the Summer Palace, see Lord Wolseley, *The Story of a Soldier's Life*, Vol. II, p. 74, and Lieutenant Colonel J. Cooper King, *The Story of the British Army*, p. 346. For the destruction of the Mahdi's Tomb, see Churchill, *River War*, Vol. II, pp. 211-4. He says the Tomb "had been for more than ten years the most sacred and holy thing that the people of the Soudan knew," and that it was the only fine building of any interest round Omdurman.

² Bolton King, *History of Italian Unity*, Vol. I, pp. 338, 344. But Trevelyan (*Garibaldi's Defence of the Roman Republic*, p. 343) shows that a good deal of damage was done to the Palaces and works of art in Oudinot's bombardment.

(3) breaking into any house or other place in search of plunder.¹

Pillage is an ancient parasite of war of which not even the cleansing processes of modern times have been able to rid the world completely. The capture of towns by assault has always been its especial opportunity; witness the excesses which accompanied the stormings of Ciudad Rodrigo, of St. Sebastian, and of Badajoz, as pictured in the pages of Napier. The sack-
Pillage
in the
Crimean
war.
 ing of Kertch by the Allies in the Crimean war was almost equally disgraceful. "To pillage and devastation they added violation and murder," and the measures taken by the officers to prevent outrage and destruction were, adds Sir William Russell, "of the feeblest and most contemptible character."² Ambalaki, too, was shamelessly plundered in the same war. Zouaves, Chasseurs, and Highlanders vied with one another in carrying off the hens, ducks, clothing, etc., which they found in the abandoned town. "A French soldier, who, in his indignation at not finding anything of value, had with great wrath devastated the scanty and nasty-looking furniture (in one of the houses), was informing his comrades outside of the atrocities which had been committed, and added, with the most amusing air of virtue in the world, '*Ah, Messieurs, Messieurs! ces brigands, ils ont volé tout.*'"³ The looting capacity of the Zouaves was summed up by an Irish Grenadier in the words—"Troth, if the devil was asleep, a Zouave would stale one of his horns to keep his coffee in!"⁴ But it is questionable whether the Zouave was not surpassed by the Sikh of the Mutiny days in the art of ingenious pillaging. The capture of Lucknow was succeeded by a regular carnival of pillage; the Sikhs began it, but it must be admitted that the European soldiers showed themselves determined not to be outdone by their Indian brothers-in-arms in gang-robbery any more than in prowess.⁵ At Cawnpore things were better,

¹ *Laws and Customs of War*, p. 35. Section 49, A.A., also referred to by Professor Holland, deals with the constitution and procedure of Field General Courts Martial, for trying men guilty of such offences as are mentioned in Section 6.

² Russell, *Crimea*, pp. 458, 472; Nolan, *War with Russia*, Vol. II, p. 333.

³ Russell, *ibid.* pp. 450-1.

⁴ Nolan, *War with Russia*, Vol. II, p. 473.

⁵ Kaye and Malleon, *History of the Indian Mutiny*, Vol. IV, pp. 275-6.

for there Havelock issued an order in which he threatened to hang up, in their uniforms, all soldiers caught plundering. It was only by some such drastic measure as this that the troops could be restrained from exercising what they regarded as their rightful privilege, dearly purchased with blood and labour. To the discredit of the same national troops as fought in the Crimea stands the looting of Peking in 1860. The French no doubt were the worse—they dressed themselves in beautiful female gowns and nearly every soldier donned a gorgeous Chinese hat instead of his képi—but the British troops were not far behind in rapacity. One officer of the 15th Punjaubees got £9,000 worth of loot, and each private soldier received a grant of £4. Lord Wolseley, who was present as a subaltern, was given by a French artilleryman a looted picture by Pettitot—a miniature of Boileau.² Forty years later the Imperial city had a further experience of the methods of the civilised troops of the West and again she had reason to remember them: looting and robbery, naked and unashamed, marked the second occupation of Peking no less than the first.³ But on the second occasion the pillage was at least not authorised.

Pillage in
the Chino-
Japanese
war.

I have already spoken of the excesses committed by the Japanese troops when they captured Port Arthur in 1894. The murder and robbery to which they gave way on that occasion, though quite unjustifiable, can at least be said to have resulted from dire provocation, and find no counterpart in any other action of theirs either in the same war or in that with Russia.⁴ At Wei-hai-wei and at Makong in the Pescadores, their conduct was unimpeachable, and when Kinchow was captured, an officer was stationed at every store to protect the proprietor from soldiers and coolies.⁵ It is not so very long since European commanders claimed a war right to give over to pillage a town which had maintained its resistance until sacked, and their view was endorsed by writers on International Law.⁶ General

¹ Kaye, *Sepoy War*, Vol. II, pp. 387-8.

² Lord Wolseley, *op. cit.* Vol. II, pp. 77-9; Cooper King, *op. cit.* pp. 345-6.

³ See B. L. Putnam Weale, *Indiscreet Letters from Peking*, pp. 227-260.

⁴ See Bonfils, *op. cit.* sec. 1227.

⁵ Holland, *Studies in International Law*, pp. 118-9.

⁶ See authorities referred to in Bonfils, *op. cit.* sec. 1227.

Halleck, doubly qualified to state the usages of war of his time, gives as one of the exceptions to the rule exempting private property from capture the case of "property taken on the field of battle or in storming a fortress or town."¹ But Lieber's *Instructions* enunciate a more commendable rule of law than that of Lincoln's Chief of the Staff. Article 44 prohibits under penalty of death "all robbery, all pillage or sacking, even after taking a place by main force." And Bluntschli's great work, published a few years later (1868), states that "it is not good war, to promise soldiers freedom to pillage a place or camp, as an encouragement for the assault." "It is contrary to military honour," he says, "to incite soldiers to do their duty by encouraging them to become brigands."² Yet the confusion and fury of a storm must always yield an opportunity for pillage or other excesses of which there will be soldiers in every army who will be ready to take advantage. "Pillage," says Sir Richard Maine, with profound truth, "is generally very easy."³ Authorised pillage, and pillage on the heroic scale, are no doubt no longer to be feared. Even if Napier's suggestion—that a storming party should be followed by a select party of troops, authorised to shoot any plunderer⁴ has not been adopted in the many years since he wrote, the advance in the discipline, the *moral*, the general military conduct of armies have rendered impossible a repetition of the excesses which were enacted at St. Sebastian, Badajoz, and Ciudad Rodrigo. It is inconceivable that any present-day troops would shoot their officers when the latter tried to restrain them, or that the foul lust, murder, rapacity which seemed to transform gallant soldiers into fiends incarnate in the Peninsular days, are at all likely to be repeated, under any circumstances, by the educated, self-respecting, highly disciplined men who formed the bulk of modern civilised armies.

Pillage
after a
successful
storm.

¹ Quoted, Wheaton (Boyd), *International Law*, p. 411. Halleck's other two exceptions are—(1) confiscations or seizures by way of penalty for military offences; (2) forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order and affording protection to the conquered inhabitants. I shall deal with these exceptions in a later chapter.

² *Droit International Codifié*, sec. 662,

³ *International Law*, p. 199.

⁴ T. Baty, *International Law in South Africa*, p. 84.

The rule that booty of war becomes the property of the State, not of the individual soldiers who capture it, has operated to bring a change for the better not less than the other salutary rule, more directly due to humanitarian motives, that the personal effects of the dead, of the wounded, and of prisoners of war, must be retained for the owners or transmitted to their families.¹

Gradual
improve-
ment in
war usage
as to
looting.

The general practice of pillage—the high art of *la maraude*—is deeply rooted in the origin of war. It has endured, in unbroken continuity, since the days of Amraphel of Shinar and his raiders until to-day. Astute commanders like Gustavus Adolphus were able to see the danger which lay in allowing a liberty which was commonly considered a divine prerogative of victorious soldiers. The Swedish Army regulations of 1632 forbade pillaging because of its bad effect on the efficiency of the troops.² But when the maxim was current that “war should support war,” no general prohibition of looting was to be expected. It was only slowly and by degrees that belligerents came round to the view that unrestricted pillaging was likely to undermine discipline. The restraints which were eventually imposed were imposed rather in the interests of armies than of populations: the victims do not seem to have counted for much in the wars of the eighteenth century and even a little later. One may see, side by side, a reference to the two motives which make for restraint or looting, in a letter which Sherman addressed to a subordinate detached for clearing duties and in which he points out that not only is the unnecessary seizure or destruction of property unjustifiably cruel to the inhabitants, but that it will result in the troops themselves becoming “utterly lawless.”³

When troops lived by what they gained with their swords like the border moss-troopers, pillage was simply in the nature of things. Unpaid or badly paid men are hardly predisposed to moderation amid the temptations of active service. One is not surprised to find the Turkish troops, whose pay consisted of uncertain trifles at uncertain intervals, giving way to pillage

¹ See Pillet, *op. cit.* pp. 338-340.

² Hall, *International Law*, p. 424.

³ Bowman and Irwin, *Sherman and his Campaigns*, p. 126.

in Thessaly in 1897;¹ yet the Turk is naturally honest and things are different in the Turkish army now. One is still less surprised to find that the system of payment by loot-money, which was at first adopted for the remuneration of the National Scouts in the South African War, was found to be so objectionable in practice that it had speedily to be abandoned.² The lack of proper pay and proper equipment was undoubtedly the reason of much of the looting which occurred on the Confederate side in the Civil War and which on several occasions led to splendid chances of crushing a beaten enemy being thrown away. At the battle of Shiloh, according to Beauregard's report, "officers, non-commissioned officers, and men abandoned their colours early in the first day to pillage the captured encampments," and General Braxton Bragg complained equally strongly of the straggling and plundering of his men.³ Stonewall Jackson's success at Middleton in May, 1862, was nullified by the misconduct of Ashby's troopers, who, according to Dabney, "might have been seen, with a quickness more suitable to horse-thieves than to soldiers, breaking from the ranks, seizing each two or three of the captured horses, and making off across the fields. Nor did the men pause until they had carried their illegal booty to their homes, which were, in some cases, at the distance of two or three days' journey."⁴ The Confederate cavalymen had to find their own horses, receiving no compensation for loss through disease or capture, and it is hardly to be wondered at that they should have tried even at the expense of their duty to replace their saddle-galled, starving chargers from the Federals' ample stock of well-conditioned remounts.⁵ The same tendency to break ranks and go in search of loot was exemplified, with still more disastrous results, after Jubal Early's successful action at Cedar Creek, in October, 1864. Early states in his despatch, speaking of his troops—"But for their bad conduct, I should have destroyed Sheridan's whole force," and again, "The victory already gained was lost by the subsequent bad conduct of the troops, who

History shows that pillaging is bad policy.

Examples from the Secession war.

¹ *R.D.I.* September-October, 1897, p. 707.

² *Times* History, Vol. V, p. 407.

³ *Memoirs of Henry Villard*, Vol. I, p. 261.

⁴ Quoted, Henderson, *Stonewall Jackson*, Vol. I, p. 333.

⁵ Henderson, *Stonewall Jackson*, Vol. I, p. 334, note.

stopped in the camps to plunder.”¹ The result of the Southerners’ unsoldierly conduct was that Sheridan, who had been absent when the Confederate attack burst upon the unsuspecting Unionists, was able to hurry up from Washington, riding post-haste in a wild gallop that is famous in story and song as “Sheridan’s Ride,” reform his disheartened forces, and turn the morning’s disaster into a splendid victory before the sun fell. Men would be a little higher than the angels, if, all but starving, seldom paid, with no equipment, with uniforms like Gunga Din’s—“nothing much before and rather less than ’arf of that behind”—they find themselves, by right of conquest, master of all that they need so sorely and restrain their hands. It may be, too, that the “thinking bayonets” who formed the rank and file of the two great Territorial Armies who met in the Secession War had the defects of their qualities, and that initiative and adaptability were paid for at the price of an occasional failure in the matter of discipline. Grant’s men were not under-fed or badly equipped, like the Confederates, yet they gave way to looting at Belmont. “Veterans could not have behaved better than they did up to the moment of reaching the rebel camp. At this point they became demoralised from their victory and failed to reap its full reward. . . . The moment the camp was reached our men laid down their arms and commenced rummaging the tents to pick up trophies.”² It is difficult to decide whether pillage is bred more readily of failure or of success. There are plenty of instances to show that men demoralised by defeat are especially prone to plunder; like the Sardinian troops who were crushed by Radetzky and his Austrians at Novara in 1849 and who had to be charged by their own cavalry to prevent their pillaging the town.³ But the few instances I have quoted from the Secession War show that, in the case at least of troops who have not been hammered by an iron discipline into that unemotional machine-mass which

¹ Gordon, *Reminiscences*, pp. 364-9. He questions the truth of Early’s report and gives the rebutting evidence of many eye-witnesses who stated that they saw no plundering, but on such a point, in a straggling action, negative evidence counts for little, and the general in chief command would not be likely to condemn his troops without reason.

² Grant, *Memoirs*, p. 163.

³ Fyffe, *Modern Europe*, Vol. III, p. 100.

is the standard and ideal of modern military training, demoralisation and plundering may be born of the flush of success. There was unquestionably a great deal of pillaging in the Secession war, though one may fail to find the "sanguinary excesses" which Calvo has condemned,¹ except in the case of the Fort Pillow episode. The Confederates who invaded Maryland and Pennsylvania in 1862 and 1863 displayed notable moderation on the Union soil. On both occasions, Lee forbade all depredations and supplies were paid for on the spot.² In the Gettysburg invasion, when Gordon occupied the town of York, he "pledged to the town the head of any soldier who destroyed private property." Stonewall Jackson's scrupulous respect for the rights of property owners may be judged from an incident which happened on the march to Romney in January, 1862. On one of the worst nights, the captain of a Virginian company, on whose property a halt had happened to be made, allowed the men to use the fence rails for camp fires; Jackson suspended the officer for allowing private property to be destroyed.³ Other generals, however, were less careful to prevent any tendency to plunder. The Federal cavalry were especially given to petty looting. A reliable historian records that :—

In the *Richmond Examiner*, June 27th and July 5th, 1864, were printed official lists, sent by Generals Lomax and F. Lee, of various items of private property and personal effects which had been taken from Virginian homes by the Federal cavalry and which were found in the waggon-trains captured by the Confederates at Trevilian's and at Reams' Stations.⁴

Kilpatrick, who commanded Sheridan's cavalry in the march to the sea, had "an invidious reputation for rapacity and lawlessness." But the southern "bushwhackers" or guerillas were undoubtedly to blame for no small portion of the pillage which was charged to the Union soldiers.⁵ It is especially difficult to

¹ See Baty, *International Law in South Africa*, p. 82.

² H. A. White, *Lee and the Southern Confederacy*, pp. 200, 286; see also Draper, *op. cit.* Vol. II, p. 452.

³ Henderson, *Stonewall Jackson*, Vol. I, p. 190.

⁴ H. A. White, *op. cit.* p. 397, note.

⁵ Wood and Edmonds, *History of the War in the United States*, p. 406 (from Cox's *March to the Sea*).

Difficult
to prevent
looting
where
residents
have fled.

prevent looting when an army is moving in a hostile country from which the inhabitants have mostly fled, and in which there are no civil authorities to fulfil requisitions. The abandonment of their homes by the residents of an invaded district is "the very thing to provoke the plunderers."¹ It was so in the Crimea, in the Seven Weeks' War,² and in the Franco-German. As to the latter Mr. Sutherland Edwards says:—

All the stories of pillage told me had, on examination, resolved themselves into that sort of thing. Troops famished, exhausted, and at the same time excited by battle, arrive at a village from which the panic-stricken residents have fled. The troops help themselves and what else are they to do?³

And the same story could be told of Sherman's march to the sea. The civil authorities had fled and the Federal "bummers" had to help themselves; one cannot wonder that what began as permissible foraging verged occasionally into unauthorised looting.⁴

Devasta-
tion is not
pillage.

The clearing of a country of supplies, be it noted—such as was carried out by Sherman and Sheridan in 1864–5 and by the British in 1900–2—is not looting; for the essence of loot is the appropriation of property for the enrichment of the captor. War necessity may demand, as I have shown, that private property should be seized or destroyed as a means towards overcoming the resistance of the enemy's armed forces. "If a general can in any way," says Sir F. Maurice, "interfere with the source from which an enemy is obtaining *his supplies of food*, ammunition, and fresh men, he can *diminish his fighting power* as effectually as if he broke up his organic unity in battle."⁵ And General Halleck wrote to Sherman in September 1864, "I do not approve of General Hunter's course in burning private houses or uselessly destroying private property. That is barbarous. But I approve of taking or destroying what may serve as supplies to us or to the enemy's army."⁶ (He was speaking with special reference to the conditions obtaining in the Confederate States, in which the whole country was

¹ Russell, *Crimea*, p. 466.

² Edwards, *op. cit.* p. 112.

³ Sir F. Maurice, *War*, p. 31.

⁴ Hozier, *Seven Weeks' War*, p. 334.

⁵ Sherman, *Memoirs*, Vol. II, p. 183.

⁶ Sherman, *Memoirs*, Vol. II, p. 129.

practically the storehouse and granary of the active army, which had no other supply-source.) But it is in such clearing operations that loot finds the most fruitful soil for its germination and growth. It is nothing short of impossible to prevent pillage when troops are employed, generally in small bands and not under the command of an officer, in foraging or clearing work over a wide region of country. The South African war was a unique opportunity for the soldier-buccaneers and there is evidence that the opportunity was not neglected. A brilliant British commander has commented on the low standard of morality which his countrymen of the rank and file displayed as regards lifting chickens and pigs,¹ and another writer, who speaks from personal knowledge, states that the penalty for looting was a "military fiction."² Lord Roberts himself had to appeal for the restoration of family Bibles which had been looted from the Boer farmhouses by the soldiers. Does not Mr. Kipling's trooper, drawn from life, surely, and typical of his kind, sing unblushingly—

I wish my mother could see me now, with a fence-post under my
arm,
And a knife and spoon in my puttees that I found on a Boer
farm?

De minimis non curat lex and war law is powerless to prevent the looting of chance fowls, ducks, geese, sucking pigs, which happens in every campaign and which the soldier regards rather in the light of a joke, as an innocuous way of relieving his over-wrought nerves, than as a form of theft. "The hens," said Lee in the Secession War, "had to roost mighty high when the Texans were about." "According to a Confederate private the most inoffensive animals, in the districts through which the armies marched, developed a strange pugnacity, and if bullet and bayonet were used against them, it was solely in self-defence."³

Impos-
sible to
prevent
petty
loot.

¹ Sir Ian Hamilton, *A Staff Officer's Scrap Book*, p. 215; see also ditto, Vol. II, p. 162.

² *A Subaltern's Letters to his Wife*, p. 184. The author states that a Brigade Order was issued, that "Loot must not be carried openly on the saddle." "It was as though the Chief Commissioner of Police had publicly said 'Murderers are requested to put the bodies where constables can't find them.'"

³ Henderson, *Stonewall Jackson*, Vol. II, pp. 352-4.

Booty as
distinct
from loot.

The prohibition of pillage does not extend to *booty* or spoil of war. As Baron Jomini, the President, remarked at Brussels, "there is a kind of booty which is allowed on the field of battle, for instance, that which consists of horses, munitions, cannon, etc.,—it is the booty gained at the cost of private property which the Committee wish to forbid."¹ Arms, equipment, uniforms, horses, army stores and supplies, and public moneys—generally speaking, such things as are provided for in Army Estimates—come under the head of permissible booty. In the list of the "spoils of war" taken by the Japanese at Mukden and Fushun, the following items appear:—Arms, ammunition of all sorts, engineering tools, iron wire, horseshoes, clothing, accoutrements, machinery for coal mining, timber, horses, bread, fuel, forage, cereals, millet, beans, unrefined salt, preserved provisions, oxen, tents, beds, stoves, telephones, balloon-waggons, and ropes.² Cash belonging to the public Treasury is always subject to seizure; the Germans appropriated very large sums which they found in Strassburg and Toul in 1870.³ They also seized tobacco on the ground that it was a State monopoly. A tobacco-manufactory at Dieppe was made the source of considerable profit to the invaders' exchequer. It belonged, like all such establishments, to the State and "General von Goben explained to the municipality that, as state property, the tobacco-factory passed from the hands of the French to those of the Prussian Government. As the representative of that Government, he could not work the manufactory, neither could he carry it away with him, and he had no wish to burn it. He therefore proposed to sell it and (making a good guess) fixed the value at the round sum of 100,000 francs. The municipality protested against the exorbitancy of the demand, which was ultimately reduced to 75,000 francs. Part of the money was paid down at once and the rest a day or two after."⁴ Similarly

¹ Brussels B.B. p. 298. See Oppenheim, *International Law*, Vol. II, p. 141.

² Kinkodo Company's *Russo-Japanese War*, pp. 1096-8.

³ Hozier, *Franco-Prussian War*, Vol. II, pp. 72, 74. The British Official *Field Service Regulations, Part II (Organisation and Administration)*, of 1909 lay down (section 37 (3)) that "public money belonging to a hostile Government will be appropriated as directed by the Commander-in-Chief."

⁴ Hozier, *Franco-Prussian War*, Vol. II, p. 212.

in the Seven Weeks' War, tobacco being a Government monopoly in Austria, twenty-seven million cigars which were captured on the occupation of Prague, were confiscated for the benefit of the Prussian troops, and at Göding £50,000 worth of cigars were confiscated.¹ In the Secession War the Federals seized cotton in the Southern States on the ground that, though strictly private property, it had become practically State property, being the means by which the rebellion was maintained. "If property be such that it ministers directly to the strength of the enemy and its possession *alone* enables him to supply himself with the munitions of war and to continue the struggle, then it may be confiscated."² The case of the cotton in the Civil War was practically *sui generis* and is hardly likely to arise in any future war. State property which cannot be turned to warlike uses is not confiscable. No commander would to-day pack a famous library into his army-waggon and carry it off as spoil of war, as the Palatinate library at Heidelberg was carried off to the Vatican; or, like Napoleon in Italy, ransack an invaded country for bronzes and marbles which had endured the warfare of the middle ages only to become at last the booty of a civilised nation. Assuredly the better part was that chosen by England in 1812, when she restored to the Academy of Arts at Philadelphia a collection of Italian paintings and prints which a British vessel had captured at sea. "The arts and sciences," so ran the document relating to the restoration, "are considered not as the peculium of this or that nation, but as the property of mankind at large."³ The Germans adopted an equally commendable attitude in 1870-1 with respect to scientific and artistic collections: not a single piece of Sèvres china was appropriated by them.⁴

Private property is exempt from loot, but it must be carefully premised that by loot is meant the definitive appropriation of movable property for the purpose of the enrichment of the captor.⁵ As I have shown in the last chapter, the imperative

The legitimate seizure of private property is not pillage.

¹ Hozier, *Seven Weeks' War*, pp. 332, 397.

² Boyd's Wheaton's *International Law*, sec. 346 b.

³ Hall, *International Law*, p. 422, note.

⁴ Pillet, *op. cit.* p. 339, note.

⁵ On this question of booty it appears to me that Dr. Lawrence is certainly in error. He defines booty as "*private* movables taken from the foe in the

necessity of war justifies the *seizure* or destruction of all kinds of property, and I shall show later that the war rights of requisition and contribution constitute a further limitation on the rule exempting private property from seizure. It must also be borne in mind that under the Hague Article LIII, second paragraph, certain kinds of private property are subject to seizure on the principle that they may be applied to warlike purposes and may therefore be taken by a belligerent for his own immediate use or to keep them from being used by the enemy. They are things of such a nature that they cannot be safely left at large, as it were, in time of war. It is a natural precaution for an invader to sequester warlike instruments which might be used against him; he may quite properly order the inhabitants of an occupied district, *e.g.*, to deliver up their arms, or he may remove private stocks of dynamite or gun-cotton. But any extension of the practice of sequestering private property is fraught with danger. The Germans appear to have overstepped the mark in this respect in 1870-1. As Geffcken remarks—"What was styled, in the second half of the Franco-German war, *making safe or putting out of harm's way (le sauvetage ou la mise en lieu sûr)* was a grave abuse, which the better kind of German officers deplored and condemned as well on account of disciplinary objections."¹ It is said that the value of the movable property taken, *apart from requisitions*, by the German invaders, amounted to over ten million sterling.² The question of such private property as officers' arms, uniforms, and equipment is a little doubtful, but would appear to come under the general rule exempting private property which may be used for a warlike purpose from final appropriation, but subjecting it to sequestration. Professor Bonfils lays down in general terms that, "the right of booty extends only to the fortune of the belligerent State, to the arms and equipment of the defeated

The question of officers' arms privately owned.

course of such warlike operations on land as the capture of a camp or the storming of a fort." I think it is quite clear from Article LIII (and that article, like the whole chapter of which it forms part, is applicable to invasion as well as occupation), that private property which can be used for warlike purposes can only be *sequestered*; and from Article XLVI, that private property which cannot be so used is entirely exempt from seizure.

¹ Quoted, Bonfils, *op. cit.* sec. 1228.

² Bonfils, *op. cit.* sec. 1229.

troops, and to contraband of war.”¹ Contraband of war is a dangerous phrase to apply outside of its proper element of maritime war. Mr. Hall states more specifically that “arms and munitions in the possession of the enemy’s force are confiscable as booty, although they may be private property.”² I cannot agree with this view. Article LIII (which I shall deal with more fully in its proper place) makes it clear that it is only Government property which is confiscable; arms and other articles which would be classed as contraband of war at sea, and therefore subject to capture, do not pass to the captor on land, if they are owned by private individuals. The enemy may seize them, but he must either restore them or pay compensation.

¹ Bonfils, *op. cit.* sec. 1230.

² Hall, *International Law*, p. 435.

CHAPTER VI

SPIES

Conventional law of war,—Hague *Règlement*, Articles XXIX to XXXI.

ARTICLE XXIX.

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains, or endeavours to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

ARTICLE XXX.

A spy taken in the act shall not be punished without previous trial.

ARTICLE XXXI.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Con-
ditions
which
establish
the
quality of
a spy.

ARTICLE XXIX lays down the conditions precedent which establish the character of the spy, in the esoteric sense of the word. They are:—

- (1) the obtaining or seeking to obtain military information for the belligerent employing him;
- (2) doing so clandestinely or under false presences; and
- (3) doing so in the zone of operations of the other belligerent.

These three conditions are expressly specified in the first paragraph of the article; but, perhaps through some error in drafting, the second paragraph goes on to speak of *messengers* and *despatch bearers* (who do not seek information at all and are therefore lacking in the essential condition No. (1) above), and lays down that such persons are not considered spies if they carry out their mission openly; implying, as a necessary inference, that, if they do not carry out their mission openly, they may be regarded as spies. One can therefore only conclude that, as the conventional war law of the subject stands, the following proviso must be added to the three conditions mentioned above, namely:—

(4) Messengers and despatch-bearers are assimilated to spies if they come under conditions (2) and (3).

I shall deal with this fourth class presently.

The essence of spying is false pretences. The philosophy of the matter narrows itself down, one may almost say, to a philosophy of clothes: Herr Teufelsdröckh would have discoursed on it admirably. The spy is usually a soldier who has abandoned the recognised badge of his craft and his nation and adopted some disguise to shield his real character and intent. He has thrown away the insignia of his status, the evidence of his brotherhood among fighting men, and that for a purpose which the enemy has the greatest interest an army can have to frustrate. The soldier who “spies” openly is not a “spy” in the military sense. Reconnaissance and scouting, however daring, are not spying if there is no disguise. This point was brought out clearly at the Brussels Conference, the Protocols of which show that the delegates were agreed that soldiers wearing uniform “are considered as patrols who are lawfully reconnoitring; but if, in order to do this, they put on the uniform of the enemy, or disguise themselves in any manner whatever, they are considered and treated as spies.”¹ To establish the quality of spy in the case of a soldier, there must be disguise; in the case of the civilian spy, disguise is not essential—the clandestine nature of the act is sufficient condemnation. The spy in modern war is usually a soldier who dons civilian dress, or the

False
pretences
the
essence
of spying.

¹ Brussels B.B., p. 311.

uniform of the enemy, or of a neutral country; and in all these cases, he would be liable to punishment, apart from this article, for assuming a disguise to further a hostile act. The soldier who creeps, disguised, into the enemy's lines to learn his strength and dispositions, is a far more dangerous factor in war than he who does the same to carry out an act of direct hostility, and it is for this reason that spies are punished with peculiar severity. Spying is not criminal—that follows from Article XXXI, which relieves the spy who has regained his own army from any further liability, which he would not escape had he committed a breach of the laws of war.² The punishment of the spy is solely preventive—*Abschreckungsmittel*, to use Lueder's term—a means of deterring others from following his example. Many jurists regard the spy as necessarily tainted with dishonour. "It is legitimate," says Hall, "to employ spies; but to be a spy is regarded as dishonourable, the methods of obtaining information which are used being often such that an honourable man cannot employ them."² But if it is dishonourable to be a spy, surely it is more dishonourable to employ one? For the spy at least does grown man's work and risks his life under conditions which try the heart, brain, and nerves beyond any other phase of warfare. To be either principal or agent in the matter must be dishonourable, or neither is dishonourable. At one time, no doubt, the spy was a man who acted solely for gain and risked his usually worthless neck for sordid motives. But the spy of to-day is not seldom an eminent soldier, to whom the dangerous and difficult task has been entrusted in virtue of some peculiar capacity of his for such work. The reproach which attaches to the term in its peace significance seems somehow to hang about it in the very different circumstances of war. Analogy—association—is probably responsible for the

Spying
not neces-
sarily dis-
honour-
able.

¹ It is somewhat anomalous that the spy, who is more severely punished than the soldier who disguises himself for some overt hostile act, should have this advantage over the latter, that once his act of espionage is finished he is absolutely immune, while the other is still liable to be punished. The spy may have been recognised by the enemy while acting as such, and having escaped, be subsequently captured, but he cannot then be penalised for that act of spying. His success purges his "offence," which is not a breach of the laws of war, as is, say, assuming the enemy's uniform for a hostile end.

² Hall, *International Law*, p. 538. See, on the other hand, Lawrence, *International Law*, pp. 427-8, and the quotation there from Napier.

idea that the war-spy's calling dishonours him: "company, villainous company, hath been the spoil" of the word and perhaps it will keep its bad significance to the end of time. Yet every nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever, says Lord Wolseley.¹ "Spies," says an American military writer, "are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service."² Great commanders have thought it no dishonour to essay the role. Catinat disguised himself as a coal-heaver, Montluc as a cook, to spy out the enemy's land.³ Ashby, the Confederate cavalry leader, Jeb Stuart's predecessor and all but equal, first recommended himself to Stonewall Jackson by visiting the Federal lines as a horse doctor.⁴ General Nathaniel Lyon visited the Confederate camp at St. Louis in disguise before he attacked and captured it.⁵ These were honourable men and soldiers, and it is surprising to find a military historian like Sir Henry Hozier declaring, in face of such instances, that "spies have a dangerous task and not an honourable one."⁶ The fact is that the spy is very much in the same position as the revolutionist; both risk everything on the chance of success and no mercy is shown to either, if he fails. In the Franco-Prussian war, the Germans made an effort to improve the position of the military spy. They organised an "Intelligence Department" with different grades and good pay, and by this means, says Hozier, "the reproach associated with espionage was taken away."⁷ It would seem that the Japanese, too, are ready to break with the traditional view as to the spy's calling. One who went through Kuropatkin's campaign in Manchuria has recorded the following instructive incident:

Appreciation of spying by the Germans;

by the Japanese.

To mark their appreciation of espionage as a distinct branch of honourable warfare, the Japanese did a curious thing after the

¹ Lord Wolseley, *Soldier's Pocket Book*, p. 81.

² Colonel A. L. Wagner, *Service of Security and Information*, p. 181.

³ Farrer, *Military Manners and Customs*, p. 145.

⁴ Henderson, *Stonewall Jackson*, Vol. I, p. 222.

⁵ Wagner, *op. cit.* p. 180.

⁶ Hozier, *Seven Weeks' War*, p. 83.

⁷ Hozier, *Franco-Prussian War*, Vol. II, p. 103.

battle of Liao-Yang. They captured a Russian spy dressed as a Chinaman, and after shooting him, passed into the Russian lines a communication in which they hailed him as a brave man, and expressed the hope that the Russian troops held many others as brave as he.¹

Difference
between
spying
and recon-
naissance.

The bearing of Article XXIX may, I think, be aptly illustrated by the case of two American officers who did valuable secret service work for their country in the war of 1898. The one, Lieutenant Victor Blue, United States Navy, made a "daring journey of seventy miles through the enemy's country" in Cuba, for the purpose of discovering whether Admiral Cervera's ships lay in the blockaded harbour of Santiago or not. He wore his uniform and side-arms, and, therefore, had he been captured, he would have been entitled to the privilege of a prisoner of war.² The other, Lieutenant H. H. Whitney, of the Fourth Artillery, shipped as a common sailor on a British tramp steamer at St. Thomas in the Danish West Indies, landed at Ponce, Porto Rico, and explored the interior of the island, gaining valuable information.³ As he was disguised, he would have been treated as a spy if taken. I have already mentioned the case of two Japanese General Staff Officers who were captured and executed for endeavouring to blow up a bridge in the Russian rear in 1904, being disguised as Chinamen.⁴ They were not technically spies, for they were not collecting information, but the Japanese army made frequent use of spies during the war. It was even said that the "Chinese coolies" who were employed by the Russians to dig holes in which to plant mines across the Isthmus of Liatung (Port Arthur) were Japanese soldiers in disguise.⁵ But at times they chose to carry out their reconnaissance or secret service work without the aid of disguise. Thus:—

On July 12, two Japanese officers were arrested by the Russians, having been overtaken by daylight in examining the defences before Liaoyang. These officers, being in uniform, were treated as prisoners of war and sent west by rail in the usual way.⁶

¹ Douglas Story, *The Campaign with Kuropatkin*, p. 177.

² Titherington, *Spanish-American War*, pp. 197-8.

³ *Ibid.* p. 336; Wagner, *Service of Security and Information*, p. 180.

⁴ See p. 110 *supra*.

⁵ T. Cowen, *Russo-Japanese War*, p. 287.

⁶ *Reports of Military Observers Attached to the Armies in Manchuria*, by American Officers, p. 160.

For some future military historian who will devote his attention to the development and history of spying, as a measure of warfare, there is a rich field of material in the American Civil War. The spies in that war—"scouts" they were called—were specialised men, like the British Intelligence Officers in the Peninsula, but played an even more important part than the latter and were constantly employed by the commanders on both sides, whose combinations and strategy were founded very largely on the information brought back by their trained spies. Generally they were organised in separate battalions or companies. Sheridan, for instance, had a battalion of scouts, commanded by a Major H. K. Young, 1st Rhode Island Infantry, who were disguised in Confederate uniforms whenever necessary and paid from the Secret Service Fund.¹ Federal Cavalry regiments had a "scouting squad," clad in "butternut" or "Confederate grey."² On the Confederate side too, the enemy's uniform was the disguise generally adopted. J. B. Gordon had a very useful "scout"—"young George of Virginia," who passed through many a perilous coil to die long after of old age. "He always," says Gordon, "wore his Confederate grey jacket, which would protect him from the penalty of death as a spy, if he should be captured. But he also wore, when on his scouting expeditions, a pale blue overcoat captured from the Union Army."³ He was never captured and so one cannot tell whether the Federal authorities would have been disposed to acquit him of spying in virtue of a uniform which could not be seen. It is at least extremely doubtful. The *American Instructions* define a spy as "a person who secretly, in disguise, or under false pretence, seeks information with the intention of communicating it to the enemy" (paragraph 88). Gordon's scout was undeniably disguised, whatever he wore underneath the disguise, and this paragraph would certainly be a warrant for his condemnation. Had he fallen into Sherman's hands, he would assuredly have been treated as a spy, for Sherman went, if anything, beyond the *Instructions* in his interpretation of the term. "If," he said, "any person in an insurgent district cor-

The
"scouts"
or spies of
the Seces-
sion war.

¹ Sheridan, *Memoirs*, Vol. II, pp. 1-2.

² Villard, *Memoirs*, Vol. I, p. 298.

³ Gordon, *Reminiscences*, p. 424.

Undue ex-
tensions
of the
applica-
tion of
the term
"spy."

responds *or trades* with an enemy, he or she, becomes a spy."¹ A person who trades with the enemy is not a spy within the meaning of the word in war law; though, of course, he may be liable to punishment for contravening the martial law regulations of the occupying army. (I shall show, too, in Chapter XI, that in their war right to punish the inhabitants of an occupied district for "war treason," commanders possess a power which makes the restricted scope and significance given to the term "spy" by conventional war law a matter of little practical moment: for the "war traitor" need not be taken in the act, to be convicted, and the manner in which he comes by the information which he transmits is immaterial.) A spy is one who collects or (for success in the search is immaterial) seeks to collect information,² and the soldier who dons a disguise for any other purpose than seeking information cannot be classed as a spy. If Sir Henry Hozier voices the official view of the German authorities in the War of 1866 when he describes as a spy anyone in disguise who cuts the enemy's telegraph wire, on the ground that "it is equally culpable in war to prevent communication by unfair means within the lines of an army as it is to seek to obtain the same in disguise between the enemy's sentries,"³ then on this point as in the matter of balloonists the Germans stretched the application of the term beyond reason and precedent. They claimed the right to treat as spies all persons who tried to pass out of Paris in 1870 in balloons. Those whom they captured were not actually executed but were treated with great severity. "A. M. Nobécourt had his balloon fired upon and when subsequently captured, he was condemned to death; the sentence was commuted to fortress imprisonment at Glatz."⁴ The Hague *Règlement*, reproducing the decision arrived at at Brussels, has now declared expressly

Balloon-
ists are
not spies.

¹ From Sherman's instructions to his officers, issued when he assumed command of the Department of the Tennessee, October, 1863 (Bowman and Irwin, *Sherman and His Campaigns*, p. 126).

² *American Instructions*, paragraph 88. "The spy is punishable with death by hanging by the neck, *whether or not he succeed in obtaining the information or in conveying it to the enemy.*" This represents the usage of war, now turned into conventional war law by Article XXIX of the *Règlement*, which speaks of *l'individu qui recueille ou cherche à recueillir*.

³ Hozier, *Seven Weeks' War*, p. 86.

⁴ Hall, *International Law*, p. 450.

against the German view, though it has left open the question of balloonists sent out to gain information. With the advent of air-ships as engines of war, and future wars will probably see aeroplanes largely used for reconnaissance purposes, the question will in all probability arise again, with new complexities and difficulties, but at present one may leave it until air fighting becomes an actuality.

The invention of wireless telegraphy has added a new problem to the chapter which deals with the war law regarding spies. So far the question has only arisen in connection with sea-fighting, but improvements and modifications in radiography may make the question one of great importance in land war too. In the Russo-Japanese war the steamer *Haimun*, fitted with De Forest's wireless telegraphy apparatus, followed the operations of the fleets in the interests of a London newspaper. She was visited by the Russian cruiser *Bayan* and as a result the Russian Government circularised the neutral Powers in an official *communiqué* which stated that, should any neutral vessels be found within the Russian zone of maritime operations, having on board correspondents supplied with apparatus of a kind not foreseen in existing conventions, which was used for the purpose of transmitting information to the enemy, such correspondents would be treated as spies and the vessels would be made prize of war.¹ The right or wrong of the Russian pretension need not be considered in a book devoted to land war. How far wireless telegraphy can be adopted to spying on land remains to be seen. A wireless installation is not a thing the military spy can carry with him, like a signalling lamp, and use as he goes; nor can it be erected secretly and with speed. An existing station could, of course, be used, and the case might easily arise of some civil resident living within the lines of one belligerent who secretly transmits military information to the other by wireless. Such a person would almost certainly be regarded as a spy, were the facts proved against him. The only difference between his case and that of the ordinary civilian spy is that he calls applied science to his aid in transmitting to the enemy the information he

Wireless
tele-
graphy
and
spying.

¹ Lawrence, *War and Neutrality in the Far East*, pp. 83-9; Bontils, *op. cit.* sec. 1100.

has collected, instead of going with it himself or sending it by a messenger.

The spy must be taken in the act.

To be condemned the spy must be taken *in delicto*. Once he has fulfilled his mission and got back to the lines of the army employing him, he sheds his dangerous character once and for all. The famous case of Major André—the *cause célèbre* of spying—shows that the spy who has passed the enemy's outposts but has not yet regained his own lines, is still liable to condemnation if taken. André was the intermediary between Generals Clinton and Benedict Arnold in the negotiations which led to the latter's defection from the American revolutionary cause towards the end of 1780. After visiting Arnold, he had passed through the American lines in disguise, and was returning with secret information as to the West Point Defences, when he was seized by some American Militiamen beyond their outposts and within sight of the British lines. He was tried by a board of fourteen General Officers, convened by Washington, condemned to death, and hanged.¹ The point involved in André's case arose again in the Russo-Japanese war, but this time as to non-military spies, with fresh complications. Many Chinese who had acted as spies for the Russians were arrested at their homes by the Japanese, tried, condemned, and executed. They were not spies, says Professor Ariga, within the strict definition of Article XXIX, for they were not taken *in delicto*, nor did they collect the information they transmitted *within the zone of operations of a belligerent*. They were persons who were bribed by Russian agents to watch the Japanese movements, generally from a position outside the latter's zone of operations, and they were all captured some time after the act of espionage alleged against them. He concludes that such persons cannot go scot free because they are not technically spies, and that they are properly classifiable in a distinct category mid-way between spies and traitors.

The Chinese quasi-spies of 1904-5;

were really war-traitors.

Professor Ariga goes on to say:—

Once the fact of their having furnished information as to the movements of our army was established we did not trouble to examine if the case corresponded exactly to the definition of

¹ *Dictionary of National Biography*, s. v. André; Halleck, *International Law*, Vol. I, p. 573; Risley, *Law of War*, p. 122.

espionage in Article XXIX of the *Règlement* but condemned the accused simply as *traitors*. Many of these individuals were arrested at their own homes and, in almost every case, their former actions were invoked in proof that they had intended to continue their treasonable practices.¹

It is this last consideration, together with the fact that the condemned Chinese were, so far as it appears, within the sphere of the invader's military authority at the time of their espionage or treason, which distinguishes their case from that discussed at the Brussels Conference of 1874, when the Belgian delegate brought up the following problem:—

An inhabitant of a district not yet occupied by the enemy enters the zone of operations for the purpose of collecting information, which he transmits to his Government or to the national army. Having fulfilled his mission, he returns home. He subsequently falls with his district into the hands of the enemy. Has the latter the right to punish him?

The president replied in the negative, and another delegate (Russian) said that he could not be condemned, "as he is supposed not to belong to an occupied territory."² The matter was not definitely decided, but the opinion expressed by the President and the Russian delegate is clearly sound. If a resident of an *occupied* territory transmits military information to the dispossessed belligerent, he is guilty either of spying or of a hostile act against the occupant amounting to war treason.³ But in the case mentioned by the Belgian representative, the man is an ordinary civilian spy and does not, like the resident in an occupied district, owe the duty of quiescence to the hostile belligerent. Once he has completed his mission, he is free from liability, under Article XXXI.

The nationality of a spy is immaterial. "The neutral citizen guilty of spying is punished just the same as the citizen of a

¹ Ariga, *op. cit.* pp. 394-7.

² Brussels B.B. p. 201.

³ See Bluntschli, *op. cit.* sec. 632.—"Any person who sends, from a place occupied by the enemy, information to the army or Government of his own country, with the intention of injuring the occupying army, may be punished as a *traitor*." And *American Instructions*, paragraph 92, lay down that—"If the citizen or subject of a country or place invaded or conquered gives information to his own Government, from which he is separated by the hostile army, or to the army of his Government, he is a *war-traitor*, and death is the penalty of his offence."

Nation-
ality of
spies im-
material.

belligerent State.”¹ In the French expedition to Madagascar an American subject named Weller was sentenced to twenty years’ imprisonment for corresponding with the enemy. The United States Cabinet demanded particulars of the affair, which the French authorities refused on the ground that the matter was one solely for their own consideration.² Many Chinese civil functionaries were condemned to death by the Japanese for spying in the war of 1904-5, and a Chinese cavalry officer, the holder of a decoration for distinguished service, was executed for having supplied guides to the Russian General Mistchenko on the occasion of the latter’s raid in May, 1905, and for “abusing his position as a Chinese officer to prolong his stay in our camp for the purpose of collecting information for the enemy.”³

The Chinese Cabinet addressed an inquiry on the subject to the Japanese Minister at Peking, and General Baron Kodama, commanding in Manchuria, being asked by Tokio for an explanation, gave the facts of the case and added :—

It must be distinctly understood that we punish spies and traitors severely and that we shall do the same in the future.⁴

The
motive
also im-
material.

The motive of the spy is also immaterial. He is equally culpable whether he has acted in the spirit of the purest patriotism or of the pettiest self-seeking. Some of the delegates at Brussels endeavoured to have a distinction made in the project between “the spy who acts from patriotic feelings, and the spy who is solely influenced by mercenary motives.” The Committee which considered the question thought that “it would be difficult to find a text which would establish this distinction, which, moreover, would be inoperative, as in military law a spy, whatever may be his motive for acting in this capacity, is handed over to justice.”⁵ No doubt they also took into consideration the difficulty of proving the motive in any case. One cannot conceive the spy who is on his trial being other than a patriot, and an eloquent patriot too, and one horrified at the imputation of base motives.

Punish-
ment of
spies.

Formerly, spies were hanged. It was so in André’s case, although every effort was made to persuade Washington to grant

¹ Pillet, *op. cit.* p. 206.

² *Ibid.* p. 206.

³ Ariga, *op. cit.* pp. 401-9.

⁴ *Ibid.* p. 409.

⁵ Brussels B.B. pp. 199, 200

him a soldier's death; and also in the case of an American officer, Captain Hale, who was condemned for spying by the British in the same war.¹ The severity of the punishment can hardly be justified to-day, even as a deterrent—a thing done *in terrorem*²—with the changed conditions of espionage, and although hanging is prescribed by the *American Instructions* (paragraph 88), the shooting of spies has become more usual in modern times. The French code of military justice provides for either hanging or shooting,³ but in the Franco-Prussian War the latter punishment only appears to have been inflicted.⁴ In the Anglo-Boer War and in the Russo-Japanese War spies were shot.⁵ It is difficult to find any reason for hanging spies which would not equally be a reason for hanging the General who employs the spy. Indeed, some jurists would restrict capital punishment even in its milder form to cases of peculiarly dangerous espionage.⁶ The objection to this is that every case of spying is potentially dangerous, and, on the ground of self-protection, commanders will hardly forgo their war-right to inflict the extreme penalty in all cases.

The clause in Article XXIX which speaks of "soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches intended either for their own army or for that of the enemy," is very difficult to follow. Such persons would not appear to be properly mentioned in an article dealing with spies. As Professor Pillet observes, "the transmission of despatches to the enemy's army is effected by means of *parlementaires*, and these are inviolable. It was superfluous,

The case of messengers and despatch bearers.

¹ Pillet, *op. cit.* p. 206.

² Colonel Wagner says (*Service of Security and Information*, p. 139), "The severe punishment habitually inflicted upon captured spies is necessary to protect an enemy from the operations of foes, whom it is difficult to detect, and upon whom the severity of the punishment rather than its probability must act as a deterrent."

³ Bonfils, *op. cit.* sec. 1103.

⁴ See Hozier, *Franco-Prussian War*, Vol. II, p. 103; Robinson, *Betrayal of Metz*, p. 132.

⁵ As to Anglo-Boer War, see *Papers relating to Martial Law* (Cd. 981), p. 123, which records that a certain Transvaal burgher was condemned to death and shot for spying. The Boers shot native spies employed by the British (Despagnet, *op. cit.* p. 345). For the Russo-Japanese War, see Ariga, *op. cit.* pp. 394-409.

⁶ Bluntschli, *op. cit.* sec. 628; Bonfils, *op. cit.* sec. 1103.

therefore, to say that they must not be considered spies."¹ And as to messengers carrying despatches to their own army or Government through the enemy's lines, they can hardly be conceived, in any circumstances, as likely to "carry out their mission openly." There is, it is true, a historical precedent for troops setting out for a night attack with bands playing, but even the deathless commander who authorised this operation would probably hesitate to commission a messenger to carry despatches of great importance through the enemy's zone and instruct him to proclaim to all and sundry what he was about. The explanation of the clause about despatch-bearers is quite possibly that given by Professor Pillet, who says: "It appears to me that there has been some mistake in the drafting of the text and that the word *openly*, which would have been in place if used of persons seeking information (spies), has no meaning when applied to messengers."² I am, however, inclined to the view that what the Conference intended was to assimilate to spies messengers seeking to pass through an enemy's lines clandestinely or under false pretences: *e.g.* a soldier in disguise, or a civilian who pretended to come on commercial business. This view is borne out by paragraph 99 of the *American Instructions*, which says:

A messenger carrying written despatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its Government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances must determine the disposition that shall be made of him.

"To make sense of this provision," says M. Paul Carpentier, referring to the Hague Article, "it must be taken for granted that a courier or a non-military messenger will only be treated as a spy if he has committed *some positive act of dissimulation or perfidy*."

Whether it is right to place messengers on the same footing as spies is extremely doubtful. The commander who captures

¹ Pillet, *op. cit.* p. 472.

² *Ibid.* p. 472. Even in the case of spies proper, the word "openly" is hardly in place; it is an unfortunate term to use. The confusion between despatch-bearers and spies dates back to Vattel.

them has a right, quite distinct from his right as regards spies, to punish them, if soldiers, because they have assumed a disguise for a hostile purpose; if civilians, because they have meddled with hostilities, which, so far at least as conventional war law goes, no civilian may do except in a *levée-en-masse*. Professor De Martens says, rightly, I think: "Neither under the usages of war observed by civilised nations, nor under the terms of the Declaration of Brussels [*i.e.* now, the Hague *Règlement*], can individuals whose sole crime has been the transmission of letters from one division to another, be assimilated to spies."¹ The only precedent for treating them as spies that I can find is one from the Russo-Turkish War of 1877-8, when the Turkish commander in Armenia seized two of the inhabitants who were carrying a letter from one Russian division to another, without the least dissimulation (according to De Martens), and had them shot as spies.²

¹ De Martens, *La Paix et la Guerre*, p. 407.

² *Ibid.* p. 406.

CHAPTER VII

FLAGS OF TRUCE

Conventional Law of War, Hague Règlement, Articles XXXII to XXXIV.

ARTICLE XXXII.

A person is regarded as bearing a flag of truce who has been authorised by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer and interpreter who may accompany him.

ARTICLE XXXIII.

The commander to whom a flag of truce is sent is not in all cases obliged to receive it.

He may take all the necessary steps to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

ARTICLE XXXIV.

The envoy loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery.

The *parlementaire* and his attendants are inviolable.

THE *parlementaire*, or person coming to hold parley with the enemy under a flag of truce, is granted inviolability under Article XXXII as well as the persons who necessarily accompany him—the trumpeter, drummer or bugler (to attract the enemy's attention), the flag-bearer and the interpreter; presumably also a guide, were the employment of one necessary, would be inviolable, and so too would be the *parlementaire's*

horse-holder.¹ The *parlementaire* may present himself without any of these attendants, and he is still entitled to protection by reason of his white flag. "The bearer of a flag of truce," says Professor Holland, "will, of course, enjoy the privileges of such although he may come unaccompanied."² This is specifically admitted in the Hague Sub-Commission's Report (1899): "The *parlementaire*," it says, "may dispense with one or more of these attendants and present himself alone, bearing a white flag in his own hands."³ De Martens is, for once, in error when he states a *parlementaire* is not inviolable unless he is accompanied by "the traditional bugler." "The white flag," he says, "is not sufficient to ensure the privileges of a *parlementaire* to any military man who approaches the enemy's out-posts."⁴ There is no warrant for this view either in usage or convention. The usual procedure is, however, for the *parlementaire* to come accompanied by some or all of the persons mentioned in Article XXXII.

The blindfolding of *parlementaires* is a common expedient to prevent their picking up information in the enemy's camp; it is prescribed by the French official *Service des Armées en Campagne* (Article 41) by the German *Field Service Regulations* (paragraph 235), and by the British *Field Service Regulations*, which lay down (section 94 (3)) that—

The bearer of a flag of truce, also the trumpeter, bugler, or drummer, the flag-bearer, and the interpreter may be blindfolded.

It is no indignity for a *parlementaire*, however high his rank, to have his eyes bandaged. A Field-Marshal of the proudest army in Europe has submitted to be blindfolded. After Sadowa, Benedek sent Field-Marshal Gablentz to the King of Prussia to treat for an armistice: he was blindfolded in passing through the army—"as is the custom of war," says Sir Henry Hozier—and, when he fell in with the King between Sadowa

¹ Bonfils, *op. cit.* sec. 1239; *Kriegsbrauch im Landkriege*, p. 26.

² British Official *Laws and Customs of War*, p. 41.

³ Hague I.B.B. p. 147.

⁴ De Martens, *La Paix et la Guerre*, p. 411. He is speaking of the case of a Turkish *parlementaire* who approached the Russian lines after the battle near Kars in July, 1877, and was fired at and wounded by the Russians.

and Chlum, the latter at first took him for a wounded Austrian General, and wasted some august sympathy upon him before discovering the real facts of the case.¹ How necessary the precaution is may be seen from an event of the last Anglo-Boer War. In August, 1900, De Wet says that he sent a messenger to the officer commanding the post at Commandohoek, ostensibly to demand his surrender, in reality to discover the strength of the English force. The messenger succeeded in getting into the enemy's camp before he could be blindfolded and brought back valuable information as to the enemy's strength and disposition.²

Can a
*parlemen-
taire* be
treated as
a spy?

The *Règlement*, like the French regulation which I have quoted, sanctions the temporary detention of a *parlementaire* who has managed to acquire some information of military value. Except in so far as Article XXXIV applies to a case of the kind—I shall speak of this in a moment—there is no express authority in the chapter of the *Règlement* concerning Flags of Truce, for punishing such a man as a spy. The *American Instructions* (paragraph 114) state that the bearer of a flag of truce who “abuses his sacred character” by “surreptitiously obtaining military knowledge” is deemed a spy. The German *Kriegsbrauch im Landkriege* (p. 27) states simply that the *parlementaire* may be accounted guilty of espionage; and the French *Manuel* (Ch. II) that “under certain circumstances he exposes himself to be treated as a spy or a traitor.” There may be a question as to what amounts to obtaining information “surreptitiously” and one might perhaps draw a distinction between the *parlementaire* who merely sees what he cannot help seeing and one who (to use Dr. Lawrence's instances) purchases plans or attempts to sketch defences.³ But the *parlementaire's* mission being what it is, any information he gains he gains more or less surreptitiously, and if he even looks about or listens to soldiers talking around him, he might conceivably be regarded as a spy, since he “obtains or seeks to obtain information in the zone of the enemy,” “clandestinely or under false pretences.” But, as

¹ Hozier, *Seven Weeks' War*, p. 231.

² De Wet, *Three Years' War*, p. 182.

³ Lawrence, *International Law*, p. 447.

Bluntschli points out,¹ there is nothing to prevent a *parlementaire* reporting to his chief what he has seen or heard, and the very fact that it is laid down in the *Règlement* that all necessary steps may be taken to prevent his acquiring information is evidence that the general international conscience would not uphold, in its entirety, the view I have just mentioned. It is for the commander who receives the flag of truce to ensure that the bearer gains no information, whether by sight or speech, and if he fails to take the requisite precautions, it is palpably unjust to treat the envoy's offence, for which his (the commander's) contributory negligence is partly to blame, as the very grave offence of spying. Article XXXIV is authority for the punishment of a *parlementaire* who "instigates or commits an act of treachery," and under "treachery" would no doubt be reckoned some such act as obtaining military plans or documents from some accomplice in the enemy's lines, instigated to his treasonable act by the *parlementaire*. Such a case as this would seem properly punishable as espionage, for the spy is not the less guilty because the enemy soldier is guilty too. Similarly a *parlementaire* who sketches defences, in the improbable case of his being able to bribe the soldiers told off to keep watch over him to allow him to do so, would seem to be a spy within the meaning of the term. The original draft of the article which came before the Brussels Conference stated that a *parlementaire* lost inviolability if proved to have abused his privileged position "*to collect information or to incite to treachery*," but the words in italics were omitted on the ground that the provision was already embodied in the article dealing with spies (Article XXIX).² The Hague Conferences were silent on the subject and there is some uncertainty as to whether a *parlementaire* who manages to obtain some military information either by looking about him or by asking the enemy soldiers is to be considered a spy or not. It is much to be desired that the next Hague Conference should make the

¹ Bluntschli, *op. cit.* sec. 683, *note*.

² Brussels B.B. pp. 175, 208. The German military delegate at Brussels observed that "he could not easily comprehend the eventual treachery of a bearer of a flag of truce, who is all the time observed by the party receiving him," but the Belgian delegate said that cases of the kind were cited (do. p. 287).

matter quite clear. The protocol of the Brussels Conference—the commentary on an article which is now Conventional war law—and the last line of Article XXXIII are hardly consistent. Under the former, the *parlementaire* who “collects information” (*recueillir des renseignements*) is a spy and liable to be tried and shot or hanged; under the latter, he is only liable to be temporarily detained if he abuses his position “to obtain information” (*pour se renseigner*). Of course the *parlementaire* who commits a treacherous overt act—if, for instance, by making a sudden attempt, he kills the enemy commander, or puts the finishing touch to a previously concerted plan of blowing up the enemy’s magazine—clearly forfeits his claim to inviolability.¹ Such treacherous acts are immediately damaging in their effects, and a special provision is no doubt required to deter a desperate man from abusing his privileged position to carry them out. But spying, or *quasi*-spying, stands on a different footing. Here the detention of the envoy would prevent any ill result following from the abuse of the flag of truce, and this consideration, together with the fact already referred to, that it is the duty of the belligerent receiving the flag of truce to prevent any possibility of its being abused, makes one incline to the view that in none but the very extremest cases (if he purchases plans, say, or sketches defences) ought a *parlementaire* to be regarded as a spy.

A flag of truce need not be received in all circumstances.

A belligerent is not obliged to recognise a flag of truce in all circumstances. Military necessity may make it necessary to refuse to admit one while a secret movement is being executed, or in the midst of an engagement when “to suspend the fighting at the very moment the *parlementaire* presents himself, would be to risk sacrificing the victory at the decisive moment or paralysing the pursuit.”² Paragraph 112 of the *American Instructions* states that a *parlementaire* can be admitted during an engagement only exceptionally and very

¹ He loses his inviolability under Article XXXIV, but apart from that article he would lose it under the terms of Article XXIII (b) in the cases I mention. The word “treachery” in Article XXXIV was objected to at the first Hague Conference as being inapplicable to a crime directed at the enemy; but it was retained because the penal legislation of some States regards the provoker of an act of treason as an accessory (*co-auteur*). (Hague I B.B. p. 147).

² Bonfils, *op. cit.* sec. 1241.

rarely, and paragraph 113 lays down that if the envoy is killed or wounded in such circumstances, no complaint can arise. A provision similar to this last one is to be found in the original draft for the Brussels Conference, which reads—

If the bearer of a flag of truce presents himself in the enemy's lines during a battle and is wounded or killed, it shall not be considered as a violation of law.¹

The words "by accident" were inserted after the word "killed" in committee, but the whole article was suppressed eventually as being likely to give rise to recriminations, owing to the practical impossibility of proving whether the killing was accidental or not.² It was felt, no doubt, that although the article represented existing usage, no useful end would be served by drawing attention, in a diplomatic document, to what is an inevitable mischance of hostilities, like the fortuitous killing of a woman or child. To fire on an envoy deliberately and without warning would be a breach of war law, but if, having presented himself and having been signalled or warned to retire, he persists in advancing, then military necessity would justify his being shot at.³ If a commander has the right to refuse admission to an envoy, he must have the right to take adequate steps to prevent the man's forcing admission—perhaps just at the critical stage of some important secret operation.

Has a commander the right to declare beforehand that he will not receive a flag of truce during a specified time or until a certain demand is acceded to? The question arose at the siege of Paris, in 1870, when the Prussian headquarters forbade any communication by flag of truce until satisfaction was obtained for "an accident which a messenger with a flag of truce had to complain of" some few days before. M. Jules Favre stigmatised the refusal to communicate by flag of truce as "directly contrary to the rules of war," and as amounting to "an absolute denial of those higher claims of the amenities of warfare which necessity and humanity have always upheld."⁴ The question presented itself from the reverse side in the

A general refusal to receive all flags of truce is illegitimate.

¹ Brussels B.B. p. 175.

² *Ibid.* pp. 287, 312.

³ Maine, *International Law*, p. 189.

⁴ Busch, *Bismarck*, Vol. II, pp. 218-9.

Spanish-American War. Marshal Blanco, besieged in Havana, notified to the American General his intention of refusing admission to any *parlementaire* who might present himself. Professor le Fur, who records the incident, holds that Blanco was quite justified in his announcement, for "on the part of the besieged, the refusal to admit flags of truce is equivalent to a declaration that the fortress will not surrender; now it is evident that a declaration of this kind is perfectly possible; it offers no inconvenience except to the besieged commander himself, who may find himself forced later on to retract his words and open his gates to the enemy."¹ But there may be other reasons for sending a *parlementaire* than to summon the garrison to surrender—it may be necessary, for instance, to arrange about the localisation of the hospitals and other protected edifices; one cannot consequently regard the reasons given by Professor le Fur as sufficient to justify Marshal Blanco's action. The question was brought up at Brussels in 1874 and again at the Hague in 1899. The Brussels Conference, despite the opposition of some of the delegates, who insisted upon the seriousness of a general interdiction of flags of truce, approved a text which read as follows:—

A commander may declare beforehand that he will not receive a flag of truce during a certain time. *Parlementaires* presenting themselves on the side of the party which has received such a notification, lose the right to inviolability.

This provision was suppressed by the Hague Conference. "According to the views of the Sub-Commission," says the Report of the latter, "the principles of international law do not allow of a belligerent being permitted to declare that he will not receive flags of truce, even for a specified time. At the Brussels Conference, in 1874, this disposition was very keenly discussed and was finally admitted only to satisfy the German delegate, General de Voigts-Rhetz. However, the military delegates at the Hague, and especially the German delegate, Colonel de Gross de Schwarzhoff, appeared to consider that the necessities of war are sufficiently met by the discretion which it is recognised that every military chief

¹ *R.D.I.* September-October, 1898, pp. 812-3.

possesses, not to receive a flag of truce in all circumstances (see first paragraph of Article XXXIII); they have therefore voted with all the other members of the Sub-Commission, for the suppression of the final paragraph of the old article 44 (*i.e.* the provision quoted above)."¹ If, therefore, a *parlementaire* does actually present himself he may be ordered back, but there is no authority in conventional war law for the legitimacy of a general notification that a flag of truce will not be recognised during a prescribed period. But the practice is not expressly forbidden and is still stated to be legitimate in some of the official manuals on war rights. The British Manual lays down that—

A commander may, under certain circumstances, declare beforehand that a flag of truce cannot be received.²

The German Manual states that :—

Every army has the power to announce that it will not receive *parlementaires* during a determined time. If in spite of this declaration, *parlementaires* present themselves, they have no claim to inviolability.³

Assuming that the discussion at the Hague has not been overlooked, it would seem that the British and German military administrations regard the deliberate omission of the provision from the text of the *Règlement*, not as condemning the practice, but as leaving it in the domain of usage. It would, however, be difficult for a belligerent to justify a general declaration, even for a limited time, that no flags of truce would be admitted, in view of the general expression of international opinion at the Hague. It is evidently condemned by all the best expert opinion.

Besides his power of refusing admission to a flag of truce in any particular case, a commander has the right to take such precautions as general or local experience has proved necessary for the protection of his force, as regards the precise manner in which *parlementaires* are to be allowed to approach. The latter

Any necessary precautions may be taken in receiving a flag of truce.

¹ Hague I B.B. p. 147.

² Professor Holland's note to Article XXXIII in *British Official Laws and Customs of War*, p. 41. The French *Manuel à l'Usage* (p. 58) allows a commander to declare that he will receive no flags of truce during a certain time, but only "for very grave motives." But the date of the *Manuel* is 1893.

³ *Kriegsbrauch im Landkriege*, p. 27.

cannot claim admission by any particular route ; it may be inconvenient for the other side to admit them by the way they select and another route may be prescribed.¹ Also, it may be necessary to order that the *parlementaire* must approach, if mounted, at walking pace, as was done at Strassburg in 1870.² Where an enemy has been known to resort to treachery in connection with a flag of truce, stringent precautions may be taken to prevent a recurrence. After the Bronkhorst Spruit incident in the Boer War of 1880-1 when the headquarters of the 94th Regiment were defeated and captured by the Boers, who were accused of having misused the white flag to surprise the British, the British commander at Pretoria issued the following order :—

No hostile armed body of men will, under any circumstances, be allowed to approach the position of troops, or, when on the march, within 1,000 yards. Any such body attempting to advance under cover of a flag of truce will be fired upon. A flag of truce will only be received when sent forward with an unarmed man and provided no advantage is taken meanwhile by armed bodies to approach.³

Abuse of
white flag
often due
to mis-
apprehen-
sion of
war law.

Every war sees complaints made about the misuse of the white flag. Often, no doubt, such complaints are well founded, for the white flag lends itself readily to treacherous misuse, but at times pure accident or misapprehension is at the bottom of the apparent misuse. Thus at Manila in 1898 the white flag could not be seen owing to its being hoisted against a white background, and an unnecessary bombardment by the American ships resulted.⁴ In the Boer War, the flag of the Orange Free State was sometimes mistaken for a white flag.⁵ I have already referred to the common misconception which prevails as to the war rights concerning the raising of a white flag in an action, as a sign of surrender.⁶ There is no such magic power in the emblem as some people suppose. In fact, the idea of its "sacredness" is more or less a popular myth ; it is sacred if used strictly in accordance with the Articles of the *Règlement*

¹ *Kriegsbrauch im Landkriege*, p. 28.

² Pillet, *op. cit.* p. 358.

Colonel Bellairs, *The Transvaal War*, 1880-81, p. 445.

⁴ Major Younghusband, *The Philippines*, p. 95.

⁵ Despagnet, *op. cit.*, p. 118.

⁶ *V. supra*, p. 92.

quoted at the head of this chapter, but no such sanctity attaches to it when used to indicate surrender, or—to take a not uncommon instance—when hoisted, not by a *parlementaire* who goes forward to meet the enemy in the recognised way, but by a retreating force to stay the enemy's hand.¹ Military necessity may justify the emblem being totally ignored in such a case, for soldiers whose success is at stake cannot be expected to attribute to the white flag the potent qualities of a fairy wand the waving of which is sufficient to check their pursuit or attack on the spot and to ensure their opponents a safe escape from a tactical mess. In the first Boer War the British commander in the Transvaal issued the following District Order, the opening words of which refer to an abuse of the white flag by the Boers at Zwart Kopje on 6th January, 1881;² it is a sound statement of the practical war law on the point:—

In order to protect the troops against a recurrence of loss of life from such savage proceedings, it becomes necessary to direct that whenever a flag of truce is displayed from a rebel position, no one from our side should advance to meet it until it has come unaccompanied by any armed body, close to our lines. The troops will be careful to keep under cover on such occasions, although the "cease-fire" may have sounded, until the O.C. directs them to rise.³

On the occasion of the siege of Port Arthur in 1904, the Japanese legal counsellors drew up a very valuable set of Instructions for the guidance of the besieging troops. These instructions were approved by the Staff and distributed to the troops.⁴

¹ When the Boers were retreating from Talana after the engagement in October, 1899, the British artillery under Colonel Pickwood failed to punish them, either because the commander thought that British mounted troops were mingled with the Boers or because he saw a white flag raised. "Which-ever it was," says the *Times* historian, very properly, "it was no reason for even a moment's hesitation." (*Times History*, Vol. II, p. 161.)

² The above seems to have been due in part, at least, to the continued firing of the Volunteers on the British side. Many cases of abuse of the white flag will be found, on examination, to have been caused by want of control of fire tactics.

³ Bellairs, *op. cit.* p. 136.

⁴ Ariga, *op. cit.* pp. 273-4.

Japanese
instruc-
tions
regarding
the white
flag
during a
siege.

IMPORTANT POINTS TO BE REMEMBERED DURING THE BOMBARDMENT OF A FORTRESS.

As a general rule, the enemy who hoists the white flag during the course of a fight indicates, by this means, that he intends to surrender. But it may very well happen that the enemy, without having that intention, and simply in order to obtain some advantage, hoists the white flag; it may happen also that the enemy really intends to surrender, but the surrender would be so inopportune for us that we could not accept it. Hence, the simple fact of the enemy hoisting the white flag does not necessarily imply a complete surrender, and consequently he should by no means cease to be fired on for that reason: the sending of the bearer of a flag of truce should establish the undertaking on both sides.

Here are several hypothetical cases in which the enemy may hoist the white flag and the way in which to behave in each case:

(1) If a soldier hoists a white flag (a handkerchief, etc., may serve the purpose), indicating that he surrenders, make him a prisoner of war.

(2) During the bombardment of a fortress, although a particular fort may hoist the white flag, it is not necessary to cease fire against that fort. The bombardment should continue until an understanding results from the arrival of a bearer of a flag of truce. A special order to cease fire will then be given by the commandant of the force.

(3) The procedure should be the same when all the hostile forts have hoisted the white flag; but, in this case, a report will be made as soon as possible to army headquarters; the troops should await orders whilst, however, continuing their fire.

(4) During the bombardment, if the bearer of a flag of truce is seen to come from the hostile camp, it is not necessary to cease or even to abate fire in the direction from which he comes, but he should not be fired on intentionally.

(5) If, during the bombardment, the enemy is seen to despatch the women and children from his camp in order to send them to a place of safety towards our line of battle or in order that they may crave the compassion of our army, there is no necessity to cease or abate the fire in the direction from which they come, but they should not be fired on intentionally. Army Headquarters should be notified and orders awaited.

(6) In the hostile fortress, the buildings at the top of which is hoisted the white or Red Cross flag are recognised as churches, hospitals, etc.; care should be taken not to fire on them unless there is evidence that the flag is being used as an artifice of war.

(7) The bearer of a flag of truce should be respected according to the customs of war; he should be treated as follows:—

Generally, the bearer of a flag of truce comes towards his adversary accompanied by an interpreter and by another person holding a white flag and blowing a trumpet. It goes without saying that he should not be fired on, but he should be stopped at the outposts and headquarters notified through the usual channel in order that the necessary instructions may be received. He should be treated with the honours due to his rank and, if occasion calls for it, an escort should be given him. When he is sent back he should rejoin the hostile army without incident.

The sad necessity of removing the dead and wounded after an engagement is frequently the occasion for communication by flag of truce. The rule of war is that each commander must tend the wounded and bury the dead, his own and the enemy's, within his own lines, but permission must be requested of the commander who remains in possession of the field to remove those lying in front of his position. In the case of a siege it would usually be the besieger who would thus have to seek permission after an attack, for the defender's dead would ordinarily be inside his earthworks or forts. The necessity for sending a *parlementaire* after each attack was overcome at Sebastopol by a special arrangement which was arrived at between the belligerents. It was settled that firing should cease whenever a white flag appeared on the battery flagstaffs to indicate that a burying party was at work in front of the batteries.¹ The arrangement appears to have worked satisfactorily under siege conditions, but it is not one which could be applied to field operations with due regard to military exigencies. When Grant and Lee were waging their long, shifting duel between the Rappahannock and the Chickahominy in 1864, the former proposed "that, hereafter, when no battle is raging, either party be authorised to send to any point between the pickets or skirmishers, unarmed men bearing litters to pick up their dead or wounded without being fired upon by the other party." Lee replied that such an arrangement would lead to misunderstanding, and proposed that the commander wishing to remove his dead and wounded should send a flag of

The white flag and the removal of dead and wounded.

Grant's proposal on this subject.

¹ Russell, *Crimson*, p. 329.

truce. Grant appears to have misunderstood Lee's meaning and replied :

I will direct all parties going out to bear a white flag and not to attempt to go beyond where we have dead or wounded, and not beyond or on ground occupied by your troops.

Lee could not agree to this suggestion, and proposed that the usual method of asking permission by means of a flag of truce should be resorted to on each occasion before search-parties were sent out.¹ A Union general, F. A. Walker, who was on Hancock's staff and therefore under Grant, has ascribed the latter's delay in sending a flag of truce on this occasion to unworthy motives ; it would, he says, have amounted to an admission that he was beaten on the 3rd June (at Cold Harbor).² There is nothing in Grant's career to show that he was actuated by anything but feelings of humanity. It is inconceivable that Grant could have lacked the moral courage to own himself beaten—Grant, who, after he had declared that he "proposed to fight it out on this line if it takes all summer," had the magnificent inconsistency to abandon that line and take a better one when he saw it. Nor is it right to accuse Lee of callousness to the sufferings of the wounded. A commander must retain his liberty to decide whether the enemy's search-parties shall be allowed access to the battle-ground he has won or not. Sometimes it is an absolute necessity of war to refuse permission : it was so at the last siege of Port Arthur—the Russian defenders turned their search-lights and their guns on the fatigue parties sent out by the Japanese to look for their wounded and Professor Ariga upholds them for doing so.³ When the requirements of the defence and the requirements of humanity come into collision, the latter must give way. Little time would ordinarily be lost through having to ask permission and even had Grant's proposal been accepted by Lee there might still have been cases in which it would have been necessary to send the enemy's searchers and litter-bearers back, so that humanity would not have been served any the more.

¹ Grant, *Memoirs*, pp. 501-2.

² H. A. White, *R. E. Lee and the Southern Confederacy*, p. 387.

³ Ashmead-Bartlett, *Port Arthur*, p. 189 ; Ariga, *op. cit.* p. 164.

The flag of truce must not be made a cloak for hostile action—that is an illegitimate ruse, involving treachery, and would justify reprisals against the *parlementaire* and the commander who sends him. But though a commander must not attack under cover of a flag of truce, he is under no obligation to maintain the *status quo* of the moment he sends it forward. He may alter his dispositions, just as he may during an armistice, and it rests with the enemy to prevent his doing so, by refusing to receive the *parlementaire* and by continuing the engagement. The British *Field Service Regulations* (section 94 (4)) authorise a general to disregard a white flag “in cases where movements of troops or material are carried out under its protection.” Some jurists have condemned Arabi Pasha for effecting the withdrawal of his army from Alexandria in July, 1882, by displaying a flag of truce in a boat and on a fort.¹ If movements may be carried out, during an armistice, in places not dominated by the enemy’s guns, or movements of such a nature that he could not have prevented them were no armistice existing (and all jurists would allow so much liberty, at least), there is no good reason for condemning such movements during the preliminaries of an armistice, that is, during the sending of a flag of truce. The British should not have allowed themselves to be hoodwinked by Arabi; if his action was “sharp practice,” it was no breach of war law. In July, 1877, the Turkish army evacuated the Shipka Pass under cover of a white flag which they despatched to General Gourko, ostensibly to negotiate a capitulation, really with the sole object of gaining time to withdraw.² Professor De Martens, who is a harsh critic of Turkish actions, states that such a ruse was “permitted by the usages of war,” and that “the Turks can justify by several historical precedents this military ruse of sending a *parlementaire* to treat for a surrender, with the sole aim of gaining time for a retreat.”³

The *Règlement* is silent as to safe-conducts and safeguards, and the usage concerning them may be briefly dismissed.

¹ Oppenheim, *International Law*, Vol. II, p. 234.

² Epauchin, *Operations of General Gourko's Advance Guard* (Havelock's Translation), pp. 118-9.

³ *La Paix et La Guerre*, p. 414.

No legal duty to cease all movements when a flag of truce is sent.

The subject is not strictly in place in a chapter on Flags of Truce, but it is convenient to discuss it here.

Safe-conducts and passports.

A "safe-conduct" or "passport" is a written authority issued by a commander to one or more individuals, allowing him or them to pass through districts occupied by his forces. The terms appear to be convertible, though some would make the "passport" confer a more extended liberty of movement than the "safe-conduct," which they would confine to an authority to come to a specified place for a specified object.¹ At any rate, a passport or safe-conduct may be given by a commander in respect of the country or district under his command. It has, of course, no effect upon the other belligerent.² It is a personal authority and is not transferable by the grantee to another; hence the photograph of the grantee is sometimes annexed to it. It is revocable by the grantor or a higher official, but good faith demands that it shall not be withdrawn to the detriment of the grantee unless it has been abused.³ If circumstances require the revocation of the passport, the holder should be allowed to retire in safety, but not necessarily by the route chosen by himself.⁴ It may be given either to combatants or to non-combatants. Safe-conducts were given to the Boer leaders in April and May, 1902, to allow them to confer about surrender; the war was prosecuted while the negotiations were in progress, notwithstanding the absence of the Boer generals from their commandos.⁵ There is no stereotyped form for passports or safe-conducts; they would probably be usually couched in some such terms as the following safe-conduct which was given to a non-combatant by the Japanese in the war with Russia—

Safe-Conduct.

Jokan Fewari, hospital attendant of the Red Cross detachment of the trading community of Moscow. The above-mentioned person, forming part of the medical *personnel* as aforesaid, is authorised to return. Certified by the Japanese army near Ta-Mou-Tcheng.⁶

¹ See Hall, *International Law*, p. 542.

² Bonfils, *op. cit.* sec. 1246; Pillet, *op. cit.* p. 359.

³ See *Kriegsbrauch im Landkriege*, p. 41.

⁵ *Times History*, Vol. V, pp. 526-7, 577.

⁴ Hall, *l.c.*

⁶ Ariga, *op. cit.* p. 200.

A safe-conduct for goods, sometimes called a "license" is Licenses. not personal to the grantee but passes with the goods, provided the transferee is approved by the authorising belligerent. Like a passport, it only binds the army of the belligerent who issued it.

A "safeguard" is "a notification by a belligerent commander Safe-guards. that buildings or other property, upon which the notification is usually posted up, are exempt from interference on the part of his troops; but the term is also used to describe a guard placed by the commander to ensure such exemption."¹ The French call the first kind of safeguard *morte*, the second *vive*.² "Soldiers employed as a safeguard are guaranteed against the application of the laws of war and if the enemy occupies the locality it is usual to send them back to the army to which they belong";³ and in such a case their arms and baggage accompany them.⁴ The object of a safeguard is generally to protect museums, historic monuments or the like; occasionally to show respect for a distinguished enemy, as in the case of the safeguard which McClellan placed over Mrs. R. E. Lee's residence, White House, Virginia, in 1862.⁵ When the allies invaded France in 1814, the Emperor Alexander of Russia honoured himself and Poland by his graceful act in assigning a guard of honour of Polish soldiers to protect the house of Kosciusko—then living, almost as a peasant, near Troyes—from pillage and contribution.

¹ Professor Holland in official *Laws and Customs of War*, pp. 44-5.

² Bonfils, *op. cit.* sec. 1247.

³ Pillet, *op. cit.* p. 360.

⁴ Bonfils, *l.c.*

⁵ *McClellan's Own Story*, p. 360. The house had a further claim on the respect of all Americans, as being that from which Washington took his bride; yet McClellan was attacked by the Abolitionists in the North for not disregarding its past and present associations, when he might have made use of it as a hospital (do., p. 406).

CHAPTER VIII

ARMISTICES

Conventional law of war: —Hague *Règlement*, Articles XXXVI to XLI.

ARTICLE XXXVI.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

ARTICLE XXXVII.

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere ; the second only between certain fractions of the belligerent armies and within a fixed radius.

ARTICLE XXXVIII.

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

ARTICLE XXXIX.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with and between the populations.¹

¹ Article XXXIX has been badly treated by official translators. The French text which was approved at the Hague in 1899, and confirmed in 1907, reads as follows :—

“ Il dépend des parties contractantes de fixer, dans les clauses de l’armistice, les rapports qui pourraient avoir lieu, sur le théâtre de la guerre, avec les populations et entre elles.”

The meaning of this is that given by me, but in Hague I B.B. (p. 332) it is translated —

“ It is for the contracting parties to settle, in the terms of the armistice,

ARTICLE XL.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

ARTICLE XLI.

A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained.

CONTINENTAL jurists distinguish between "armistices" (*Waffenstillstand*) and "suspension of arms" (*Waffenruhe*), the former being a convention for the general suspension of hostilities, sanctioned by the Governments, and usually the precursor of peace; the latter a more limited suspension arranged by the generals in the field and usually terminated by the resumption of hostilities. Of course an armistice may end in a renewal of war and a suspension of arms in peace, but generally they terminate in the manner stated. An armistice, too, may not apply to all the forces in the field—for instance, the armistice signed at Paris on 28th January, 1871, which preceded the peace, excluded the departments of Doubs, Jura, and Côte d'Or, and the town of Belfort.¹ English jurists make no distinction between armistices and suspension of arms, the former term being used indifferently of all such conventions;

"Armistices" covers "suspensions of arms."

what communications may be held, on the theatre of war, with the populations and with each other."

This incorrect translation is repeated in the British Official *Manual, Laws and Customs of War*, p. 43. The translation given in Hague II B.B. (p. 88) is inexact too, and quite misleading: it is—

"It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held, in the theatre of war, with inhabitants and between the inhabitants of the belligerent State and those of the other."

Of course, what is intended to be regulated is the intercourse of the population of the *occupied* territory with the population of the country still held by the enemy (in both cases nationals of the enemy State); and also between each belligerent force and the inhabitants of the localities held by the other. See Hague I B.B. p. 148.

Article XLI is also iniquitously translated in Hague II B.B. (p. 88), the French word "*particuliers*" being translated "private persons" instead of "individuals."

¹ German official *History*, Part II, Vol. II, Appendix 156.

and no distinction is drawn in the *Règlement*. A suspension of arms is indeed only a particular kind of armistice and the same rules apply to both.

Import-
ance of
fixing the
time in
armis-
tices.

In armistices time is of the first consideration. The moment of commencement and the moment of termination should be fixed beyond all possibility of misconception. Obviously the passage from hostile to amicable relations and the subsequent passage from amicable relations to hostilities supply a ready source of complaints, recriminations, and reprisals unless managed with the utmost possible care.¹ No difficulty arises when the suspension is for a specified number of hours, provided time be allowed for notifying the troops on both sides of the moment of commencement. But when it is for so many days, the question whether the days are to be reckoned inclusively or exclusively is always likely to cause trouble, and in such cases it is preferable to word the agreement in such a way as to make the intention clear. If the armistice is for an indefinite time good faith requires that notice must be given of the intention to resume hostilities. A good example of such an armistice and of the proper way to terminate it is to be found in the famous negotiations between Sherman and Joseph Johnston in April, 1865. An armistice was arranged for an indefinite period, terminable by either party on reasonable notice, but as some of its terms embraced political matters which Sherman had no power to deal with, it was disapproved by the President and Secretary of War when submitted to Washington for sanction. The extraordinary manner in which Sherman was treated by his ministerial superiors is an instructive lesson in the unwisdom of putting trust in princes, even in the princes of a Republic. Stanton, the War Secretary, sent to the northern newspapers an official *communiqué* which practically accused Sherman of treachery to the Union cause, and which in the latter's words, "invited the dogs of the press to be let loose upon him." Since he came out of the west to hew his great path through the heart of the Confederacy, Sherman had been the idol of the northern people, but all his

¹ See, for example, G. M. Trevelyan's *Garibaldi's Defence of the Roman Republic*, pp. 162-4, for the unfortunate results of a vague understanding as to the time of the termination of an armistice.

popularity vanished in a moment when the news of the armistice with Johnston and the official comments thereon were made known, and he became the most universally vilified individual in a free-tongued country. Instructions were issued to his subordinate commander to disregard his orders; Grant was sent off post-haste to North Carolina to direct operations against Johnston; Sherman himself was instructed to notify Johnston of the termination of the armistice and to resume hostilities "at the earliest moment, acting in good faith." On Grant's arrival at Raleigh, Sherman's headquarters, the following message was sent by Sherman to Johnston—

You will take notice that the truce or suspension of hostilities agreed to between us, will cease in 48 hours after this is received in your lines, under the first of the articles of agreement.

Hostilities were not, however, resumed, as Johnston agreed to surrender on the same terms as had already been granted to Lee at Appomattox, the obnoxious political clauses of the first agreement being suppressed.¹

The question of what may or may not be done during an armistice is one of much difficulty, if one tries to solve it by recourse to the jurists' writings. One school would forbid every operation or act which the enemy could have prevented had there been no armistice. "Thus, it would not be permissible for a belligerent who finds himself in a disadvantageous position from which he could not have escaped without meeting with opposition, to profit by the armistice to take up a better position. In a siege, the besieged should not repair an open breach, or construct new works or introduce fresh troops, if, but for the armistice, the besieger could have prevented his doing so, and the besieger could not continue his siege and circumvallation works, since the enemy's artillery could have prevented him."² This view is now generally

What may
be done
during an
armistice.

¹ Draper, *American Civil War*, Vol. III, pp. 603-611; *Sherman Memoirs*, Vol. II, pp. 346 ff, 358, 367; Bowman and Irwin, *Sherman and his Campaigns*, p. 403. Sherman's comment on Stanton's disloyalty was characteristic. Halleck had warned him that an assassin named Clark was detailed to kill him: after the armistice incident he wrote to Halleck—"I little dreamed, when you warned me of the assassin Clark being on my track, that he would turn up in the direction and guise he did." (Bowman and Irwin, *op. cit.* p. 485.)

² Bontils, *op. cit.* sec. 1254 (but he personally adopts the other view I

discredited by the continental jurists. It is open to serious objection on the ground of vagueness, making all kinds of abuses, uncertainties, and recriminations possible. It is now generally held that a belligerent may do everything which is not expressly forbidden in the armistice and if he thus secures an advantage, the other belligerent is estopped from complaining, for he should have displayed more foresight in the negotiations. It was proposed, in the draft for the Brussels Conference, to make the matter clear by laying down that—

On the conclusion of an armistice, what each of the parties may do, and what he may not do, shall be precisely stated.

The article was suppressed, not because its principle was controverted, but because it was supposed to be implied in the terms of what is now Article XXXVI.¹ It is perhaps unfortunate that the article was not allowed to stand, but one cannot take the suppression as a denial of its correctness. It is certainly the principle which has been followed in practice. A case which arose in the Russo-Turkish War of 1877-8 is instructive on the point. During the armistice of Adrianople, which preceded the peace of San Stefano, General Totleben erected a series of high observation posts, from which the Russian sentries could see into the Turkish entrenchments, along the front of his position. Such posts could not have been erected without opposition had no armistice existed, and the Turkish Commander, Fuad Pasha, demanded that they should be removed at once, failing which he proposed to open fire along the whole line. Totleben declined to remove the posts and sent a strongly-worded remonstrance to Constantinople, with the result that Fuad Pasha's action was disavowed by his Government. The right of Totleben to do as he had done was never questioned.² The same principle of liberty of action was

The
practice
of modern
wars.

mention); see also Lawrence, *International Law*, p. 456, who says, quite unjustifiably, that "it is *universally agreed* that during an armistice a belligerent may do in the actual theatre of war only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased." Professor Westlake, too, completely ignores the accepted view of Continental jurists, which I have adopted.

¹ Brussels B. B. pp. 175, 209.

² Von Pfeil, *Experiences of a Prussian Officer during the Russo-Turkish War*, pp. 346-8.

followed in the armistice arranged at Santiago in 1898, each belligerent being left free "to profit by the armistice to the best of his interests, on the sole condition that his acts were not actually hostile ones"¹—which would, of course, amount to a violation of the armistice, *hostilities* being suspended. Similarly during the armistice concluded in July, 1866, at the close of the Seven Weeks' War, the Prussian commander, whose line lay from Brünn to Ebenthal, aroused no Austrian protest when he massed his troops on his left with a view to making a dash on Presburg if the peace negotiations should fail; the Prussians lay "concentrated in one huge mass, like a crouching lion, ready to spring upon the Danube."² If Hall's opinion is correct, that "in a truce between armies in the field, neither party can . . . redistribute his corps to better strategical advantage,"³ then the action of Prince Frederick Charles on this occasion was a breach of the armistice, which Austria would hardly have allowed to go without a protest. But the English jurist's view does not appear to commend itself even to the British military authorities. The British *Official History* of the Boer War records that, as the armistice arranged by Buller and Botha at the Tugela Heights on 25th February, 1900, did not expressly forbid the movements of troops, the artillery commanders were able to transfer their guns to new positions without being shelled by the Boers, and much work was done on the right bank of the river in making roads to the site of the proposed pontoon bridge.⁴ There is little likelihood of a belligerent regarding himself as bound by the very doubtful rule which the English jurists maintain, and of refraining from exercising a very full liberty of action in future armistices; if his liberty is curtailed it must be in virtue of an express clause in the armistice and not under any general rule of war law. Where no mention of a particular act or operation is made, silence will certainly be taken as giving consent. Toral, the Spanish commander at Santiago, objected to the movements which Shafter made to the north of the city in the armistice of July, 1898, but that was be-

¹ Pillet, *op. cit.* p. 366.

² Hozier, *Seven Weeks' War*, p. 414.

³ Hall, *International Law*, p. 544.

⁴ Maurice, *Official History*, Vol. II, p. 502; *Times History*, Vol. III, p. 532.

cause such movements could have been held to be forbidden by the terms of "the rather indefinite truce between the two armies."¹ Actual hostilities need not be forbidden in the armistice convention, but everything else which it is desired to prohibit should be specially legislated for. In the armistice of Shimonosiki (Chino-Japanese War, 1895), it was expressly provided that the parties should not "extend, perfect, or advance their attacking works or reinforce or in any way strengthen either for offensive or defensive operations their confronting military line."² The armistice of Portsmouth (Russo-Japanese War, 1905) forbade the Russians to send reinforcements south of Harbin and the Japanese to send them north of Mukden, but otherwise full liberty of action was allowed to each party, and as regards the detailed terms of the armistice drawn up by the Russian and Japanese commanders in Manchuria, it was stipulated, says Professor Ariga, that "each belligerent should do whatever he wished within his own lines Every offensive and defensive operation would be allowed, provided only that such offensive operations did not touch the enemy's line."³ It was the intention to give each combatant a free hand as to what he could do and the armistice was purposely made as simple as possible. No difficulty arose as to carrying out its terms. The armistice arranged between the Corean armies was somewhat fuller, and it differed from the Manchurian armistice in forbidding "any preparation for attack or defence near the line limiting the neutral zone."⁴ In both cases the principle was followed that whatever was not expressly prohibited was allowed. This is the only safe and satisfactory rule. Where jurists disagree as to what may and what may not be done, it is most unwise to leave the question to the vague domain of International Law. The French *Manuel* (p. 62) expressly rejects the view that a belligerent must abstain from everything which the other could have prevented had there been no armistice. "This theory," says the *Manuel*, "has the capital defect of not being practical, of opening the way to abuses and recriminations, and

¹ Titherington, *op. cit.*, p. 298.

² S. Takahashi, *Cases on International Law during the Chino-Japanese War*, p. 205.

³ Ariga, *op. cit.* p. 554.

⁴ *Ibid.* p. 560.

consequently it has not prevailed during recent wars." Both the *American Instructions* (paragraph 143) and the German *Kriegsbrauch im Landkriege* (p. 44) recommend that the conditions of the armistice should make it quite clear in each case whether damaged or destroyed fortifications may be repaired, in view of the diversity of opinions on the subject, and the recommendation is equally applicable to the many other points in which disputes may arise as to a belligerent's right of action during an armistice.

Each belligerent must notify his troops of the existence of an armistice. "One is not bound to accept the notification from the enemy as to the conclusion of an armistice. The experience of military history furnishes a warning against credulity in this respect."¹ The case of Murat and the Prince of Auersberg to which I have already alluded is an example of the kind, but there are also many cases in which a belligerent has suffered through accepting his opponent's statement, made with an honest belief in its accuracy, as to the conclusion of an armistice. The Franco-German armistice of January, 1871, was notified to the German commander in the east, General Manteuffel, by the French General Clinchant (who had succeeded Bourbaki in command of the Army of the East when the latter attempted to commit suicide): Clinchant being unaware that the eastern theatre of war was excluded from the scope of the armistice. Manteuffel suspended his operations and restored about 1,000 French prisoners whom he had captured since the date the armistice was signed,² but the consequences of the mistake was more costly still to the French army, which suspended its retreat, with the result that, when the mistake was discovered, it had no alternative but to take refuge in Switzerland, where it was disarmed.³ In the Seven Weeks' War, the Prussians showed themselves equally confiding but in this case the announcement of the armistice turned out to be correct. They had the Austrian army completely at their mercy at Blumenau on the 22nd July, 1866, when an Austrian officer came out under a flag of truce and announced that an armistice had been signed the day before, to take effect at noon on the

A belligerent not bound to accept his adversary's notification of an armistice.

Modern practice.

¹ *Kriegsbrauch im Landkriege*, p. 43.

² *Ibid.* p. 43.

³ Bonfils, *op. cit.* sec. 1252.

22nd. The Prussian commander, General Bose, at once ordered the cease-fire to be sounded and broke off the combat.¹ The Russo-Turkish War of 1877-8 furnishes an instance of an enemy's notification of an armistice, made in good faith but prematurely, being acted upon by one column of an invading army and disregarded, quite properly, by the others. When Gourko's four columns were advancing on Philippolis and had reached the Turkish position at Trajan's Gate and Samakoff, a *parlementaire* came out to say that an order had been given from the Turkish Minister of War at Constantinople to cease hostilities as a truce had been made. One column, Lieutenant-General Wilhelminoff's, was delayed for 24 hours as a result of this *bona fide* misapprehension on the part of the Turks, but otherwise hostilities were not interfered with.² Even where a commander is hard pressed and has everything to gain from the conclusion of a general armistice, it may be his duty, and it is certainly his right, to refuse to accept his enemy's notification, which may be a Greek gift, designed with a political or strategical object of which the isolated commander cannot be cognisant. The cautious commander would hesitate to act on anything less than a written authority from his responsible superior in such a case. The armistice concluded in March, 1881, between Sir Evelyn Wood and General Joubert provided for the British garrisons beleaguered at Pretoria, Potchefstroom, Standerton, Marabastadt, Lydenburg, and Wakkerstroom being informed by the Boers of the suspension of hostilities. The result was as might have been expected. Cronje, who was besieging Potchefstroom, did not notify the garrison at all; the British commandants at Marabastadt and at Wakkerstroom refused to recognise the existence of the armistice in the absence of written authority. The commander at Standerton appears to have accepted the announcement. As the terms of the armistice provided that it should not come into force at the several invested towns until they received a convoy of provisions which the Boers undertook to pass through their lines, and as the waggons did not reach Pretoria, Rustenburg, Marabastadt, and

¹ Hozier, *Seven Weeks' War*, p. 407.

² F. V. Greene (U.S. Army), *The Russian Army and its Campaigns in Turkey, 1877-8*, p. 340.

Lydenburg until after peace had been made and notified, the defenders of these places were not called upon to decide whether they would give effect to their adversary's notification or not.¹

Some jurists maintain that a belligerent is bound, during an armistice, "not to put himself out of striking distance of his enemy by a retreat."² There is no authority in convention or in modern practice for such a view. I have already touched upon the question of a commander's retiring under cover of a flag of truce, and the same principles apply to a retirement during an armistice. In the Russo-Japanese War a Russian force effected its retreat during an armistice which the Japanese commander, General Asada, commanding the Guards Division, granted on 7th March, 1905, for the purpose of removing the dead and wounded. The general was taken to task by Marshal Oyama, for allowing the suspension, which was merely a ruse to cover the Russians' withdrawal. "The enemy," says Professor Ariga, "profited by a perfectly legitimate act to conceal his retreat. The ruse was legitimate. It was our generals who allowed themselves to be hoodwinked."³ A commander has always the right to refuse an armistice when there are military reasons against it or when he has reason to suspect trickery. It was found necessary on two occasions during the last siege of Port Arthur to decline to grant an armistice even for the sacred duty of removing the dead and wounded; in one case the Russians were the refusers, in the other the Japanese.⁴ Lord Roberts refused to accede to Cronje's request for an armistice at Paardeberg in February, 1900, and Sir Archibald Hunter refused Prinsloo's similar request in the Brandwater Basin in July of the same year. In the former case, an armistice would have given the Boers time to perfect their defences, and they had hopes, too, from the forces which were thought to be hurrying to relieve them; in the latter, the delay might have enabled them to find some way of escape from the enveloping British columns.⁵ "Did the officers think," says De Wet, referring

A commander may retreat during an armistice.

¹ Colonel Bellairs, *Transvaal War*, 1880-1, pp. 275, 283, 297, 325, 349, 367, 403, and Appendix O.

² Hall, *International Law*, p. 543. Also Lawrence, *International Law*, p. 445.

³ Ariga, *op. cit.* p. 257.

⁴ *Ibid.* p. 294.

⁵ *Times History*, Vol. III, p. 453; Vol. IV, p. 340.

to Prinsloo's request, "that the English would be so foolish as to grant an armistice at such a time as this, when all that the burghers wanted was a few days in which to effect their escape?"¹

Revictualling of
besieged
places
during
armis-
tices.

Another question which has been much disputed is that of the revictualling of a besieged place during an armistice. Thiers and Bismarck discussed it with heat and volubility in 1870. The former claimed that the usage of war allowed the revictualling of Paris during a suspension of arms, on the principle that, at the end of the armistice, each belligerent ought to find himself in the same situation as at the beginning; and that, without such an arrangement, an armistice would of itself suffice to capture the strongest fortress in the world.² There are precedents to be found in the Napoleonic Wars for allowing revictualment; the armistices of Treviso (1801) and of Pleiswitz (1813) provided for revictualling—every ten days in the first case, every five days in the latter.³ Again, in 1866, the Austrian fortresses were allowed to draw supplies from a limited space in their vicinity during the armistice of Nikolsburg. This space was ten miles at Olmütz, five miles at Josephstadt, Theresienstadt, and Königgrätz.⁴ But the right of revictualment has never been universally admitted. Bismarck refused to allow it at Paris unless some "military equivalent" were granted to the Prussians, and by a military equivalent he meant the handing over of one or more of the forts in the *enceinte*. To this Thiers would not agree. "It is Paris," he said, "that you ask from us, for to deny us the revictualling during the armistice is to take from us one month of our resistance; to require from us one or several of our forts is to ask us for our ramparts."⁵ The negotiations fell through over this question. No doubt a strong case may be made out for M. Thiers' contention, but on the other hand the fact that a belligerent is asked to grant an armistice shows that he is in the stronger position, and that the suspension is more advantageous to the other party than to him; else *he* would have

¹ De Wet, *Three Years' War*, p. 165.

² Cassell's *History*, Vol. I, p. 454; German official *History*, Part II, Vol. I, p. 262.

³ Hall, *International Law*, p. 545.

⁴ Hozier, *Seven Weeks' War*, p. 423.

⁵ Cassell's *History*, Vol. I, p. 454.

asked for it. He is therefore justified in requiring something more than the maintaining of the *status quo* at the moment of the agreement. He is (in colloquial parlance) "the upper dog" at the time, and he has grounds for demanding some equivalent for the advantage which would presumably have accrued to him had hostilities continued without a break. At any rate, it is absurd to speak, as Professor Pillet does, of an "incontestable right of revictualment"¹; the right *has* been contested, very specifically. The fact is that there is no inherent right of revictualment in an armistice; if the right is claimed, it must be claimed, not as a right following necessarily and automatically from the nature of the contract and conferred by the usage of war, but solely in virtue of an express stipulation in the bond. As advised in the German official manual, the question of revictualment had better be settled when the conditions of the armistice are drawn up. Otherwise difficulties are sure to arise.²

Article XXXVIII provides for the prompt notification of the troops of either belligerent. Sometimes varying times are fixed for the commencement of the armistice, to allow of distant or isolated forces being notified without delaying the effect of the suspension in nearer places, and to prevent complications arising through such forces continuing hostilities should the armistice take effect from the date of signature. Hostilities cease from the moment of signing unless a later date is specified in the agreement. They need not cease during the negotiations for an armistice; the negotiations must not be made the cover for a treacherous attack, but a belligerent is not bound to discontinue his operations because an armistice is being discussed. Spain protested against hostilities being continued by the United States in 1898 while the French Ambassador at Washington was in treaty with the President and Ministers as regards the conclusions of an armistice. The United States Government replied, quite properly, that it was a belligerent's strict right to continue his operations so long as an armistice had not been concluded.³ Once the armistice is signed, if it

Date from which an armistice begins to run.

Hostilities need not cease during the negotiations.

¹ Pillet, *op. cit.* p. 367.

² *Kriegsbrauch im Landkriege*, p. 44.

³ *R.D.I.* September-October, 1899, p. 575.

is not to commence at a later date, any acts of war done in ignorance of it are null and void, and should be rectified as far as possible. In April, 1865, Major-General J. H. Wilson, U.S.A., captured Maçon, Georgia, during the armistice between Sherman and Johnston, of which Wilson had been informed by the Confederate General Cobb, but not (as he should have been) by his own superior commander. On hearing of the capture Sherman ordered Wilson to release the captured Confederate Generals (Cobb, G. W. Smith, and McCall) and to occupy ground outside Maçon.¹ Manila was captured by Admiral Dewey and General Merritt after the commencement of the general armistice which ended the Spanish-American War. It was not, however, restored, as an article of the Protocol of Peace surrendered the city to the United States.² The capitulation of Potchefstroom in 1881 was cancelled—merely as a matter of form and to salve the honour of the defenders—under peculiar circumstances. The armistice had not begun to run when the town surrendered, but the besieging commander, Cronje, was then in possession of information that an armistice was to commence as soon as a convoy of provisions arrived; and this information he was bound, by the terms of the armistice, to pass on to the garrison immediately on receiving it. He did not do so, and the commandant, not knowing that relief was on the way, had to capitulate for want of provisions. As he might have made an effort to hold out longer if aware of the terms of the armistice, the capitulation was annulled.³

Usual to
fix a
"neutral
zone."

It is usual to fix, in the conditions of armistice, a certain space of neutral ground between the armies—a kind of "Tom Tiddler's ground"—which must not be encroached upon by the soldiers on either side. The extent of this zone varies according to circumstances. It was two miles wide in the case of the armistice of Nikolsburg (1866),⁴ about 1,000 yards in the armistice which ended the Græco-Turkish War of 1877,⁵ and in the armistice between the Corean armies in 1905, it was at one

¹ Bowman and Irwin, *Sherman and his Campaigns*, pp. 408-9.

² *R.D.I.* September-October, 1899, pp. 607-8.

³ Colonel Bellairs, *Transvaal War*, 1880-81, pp. 272-5.

⁴ Hozier, *Seven Weeks' War*, p. 421.

⁵ Clive Bigham, *With the Turkish Army in Thessaly*, p. 108.

point only the breadth of the narrow river Tou-Mien.¹ In this last case the Japanese commander suggested a wider zone of demarcation, as the Japanese soldiers used the water of the river and were encamped on its banks, so that there was danger of collision with the Russians on the opposite bank; but the Russians would not agree to any alteration of the line originally settled.² At Paris, in 1871, the neutral zone was the space between the outer perimeter of forts, which were handed over to the Germans under the terms of the armistice, and the fortified *enceinte* which was held by the French.³ The armistice drawn up in September, 1905, by Marshal the Marquis Oyama and General Linevitch, commanding the Japanese and Russian armies in Manchuria, designated the space between the first lines of the two armies as the zone of demarcation. "It is usual," says Professor Ariga, "in fixing the zone of demarcation, to provide for the maintenance of the outposts of the two belligerents at a specified distance, in order to prevent any conflict, especially when the entrenchments of the two armies are rather close. However, in the Manchurian armistice, although in certain places the entrenchments were only three or four kilometres apart, there was no question of maintaining the outposts at a distance, because, in modern wars, the works of defence in the first line are so important and must be kept so secret, that the troops would never think of quitting them, even during an armistice."⁴ In the case both of the Manchurian and Korean armistices, maps were exchanged showing the limits of the neutral zone, which, as I have said, were the lines of the opposing armies in the former instance.

Article XXXIX lays down that the parties must settle what relations are to exist with and between the populations during an armistice. This provision is rendered necessary by the principle that an armistice suspends fighting but does not affect the state of war. *Neque pax sunt indutiæ; cessat enim pugna, bellum autem manet.* In the absence of a special provision, the invading belligerent's war rights as against the population

The armistice should fix the relations to be had with and between the populations.

¹ Ariga, *op. cit.* p. 560.

² *Ibid.* 562.

³ Cassell's *History*, Vol. II, p. 222; German Official *History*, Part II, Vol. II, Appendix 156.

⁴ Ariga, *op. cit.* p. 555.

continue unchanged. He can raise requisitions, billet his soldiers, demand services in kind and even levy contributions, and his general martial law regulations remain in full force.¹ And war conditions still hold good as regards the mutual relations of the inhabitants of the districts held by the two belligerents. In the absence of special conditions in the Protocol, the conclusion of the armistice does not free the inhabitants of the occupied territory from their obligation of holding no intercourse with the people in the other belligerent's zone of authority. They may be treated as spies or war-traitors if they offend, just as if hostilities continued. Bluntschli remarks that in the case of a general armistice, which is the preliminary of a treaty of peace, there are grounds for allowing the inhabitants of the territories occupied by the two belligerents to circulate freely, but that there are general military objections to their doing so when the resumption of hostilities is likely. He does not, however, appear to have any authority for his rule that "freedom of circulation is presumed if the armistice is a general one and has been concluded for a sufficiently long time."² According to the rule laid down in the *American Instructions* (paragraph 141), there would always be a presumption against intercourse being allowed,³ and general consideration of war law and military policy are in

¹ Professor Ariga (*op. cit.* p. 556) states that the Japanese continued to exercise their rights of billeting and requisitioning, and to apply martial law, during the armistice of September, 1905, but he gives as the reason for this the fact that "the inhabitants were not, before the armistice, the inhabitants of a hostile territory." I do not think this fact makes any difference. The Germans exercised the war rights in question during the armistice made in January, 1871 (*German Official History*, Part II, Vol. III, pp. 218-9), although Thiers had expressly demanded that requisitions should be stopped, "being a war measure which must necessarily stop with hostilities" (Busch, *Bismarck*, Vol. I, p. 316). The armistice convention signed at Nikolsburg in July, 1866, provided for the Prussian troops being rationed from the territories occupied, but no contributions were to be raised (Hozier, *Seven Weeks' War*, p. 424). As the war subsists during an armistice, a belligerent would still retain any war rights not specially surrendered in the agreement.

² Bluntschli, *op. cit.* sec. 693.

³ Paragraph 141 reads—"It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any. If nothing is stipulated, the intercourse remains suspended as during actual hostilities."

favour of this latter view. The French *Manuel* (p. 61) lays down that—

If the contracting parties have omitted to arrange as to the mutual relations of the population during the armistice, each belligerent preserves the absolute right to settle the question as he chooses on the territory held by him. An armistice is not a temporary peace; it leaves the state of war in existence; consequently the comings and goings of the inhabitants about the respective positions or within the neutral zone may offer inconveniences and facilitate spying.

The Report of the Second Sub-Commission of the Hague Conference of 1899 states that “in default of special clauses in the armistice these matters [*i.e.* the relations with and between the populations] are necessarily governed by the ordinary rules of war law, especially by the rules applying to the occupation of hostile territory.”¹

Article XL has gone through a process of evolution. As originally drafted for the Brussels Conference it read—

Violation
of an
armistice.

The violation of the clauses of an armistice, by either one of the Parties releases the other from the obligation of carrying them out, and warlike operations may be immediately resumed.²

It was admitted that in terminating an armistice, it was essential that the enemy should not be attacked unawares, and the following clause was substituted for that given above, in preference to one proposed by the German Military delegate which laid down that hostilities might commence in two or three hours:—

The violation of the armistice by either of the Parties gives to the other the right of terminating it (*le dénoncer*).³

The question was discussed again at the first Hague Conference. It was pointed out that in some cases of violation the aggrieved belligerent cannot fairly be deprived of the right of resuming hostilities at once; a case in point would be where the violation consisted of a treacherous attack. But it was at the same time admitted that to regard trivial violations as a ground for terminating the armistice, and, *a fortiori*, for

¹ Hague I B.B. p. 148.

² Brussels B.B. p. 177.

³ Brussels B.B. pp. 209-210.

resuming hostilities at once, was unreasonable, and the Brussels Article was therefore modified and enlarged into the present Article XL.¹ During the Manchurian armistice in 1905, the Russian soldiers violated the terms of the agreement by entering the neutral zone. "We did not however think it necessary," says Professor Ariga, "to raise an objection, because it was really a question only of petty individual infractions which could have no effect on the armistice generally."²

¹ Hague I B.B. p. 148.

² Ariga, *op. cit.* p. 555.

CHAPTER IX

CAPITULATIONS

Conventional Law of War, Hague Règlement, Article XXXV.

ARTICLE XXXV.

Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

"A CAPITULATION is a military convention which puts an end, with or without conditions, to the resistance of a body of troops shut up in a fortress or surrounded in the field."¹ A commander of a fortress or the commander-in-chief of an army has always the right to capitulate. "He may have to answer for his conduct before the judges of his country: but the convention which he has concluded is not affected by that."² When General Toral capitulated at Santiago in 1898, there was a dispute as to his authority for doing so. Marshal Blanco, who was at Havana, telegraphed immediately to Madrid that he had not authorised the capitulation directly or indirectly, and the Spanish Government also denied having sanctioned it. "But the Spanish Government was forced to recognise the validity of the capitulation, for a governor of a fortress may capitulate under his personal responsibility, without any authorisation from his Government."³ His powers do not, however, extend beyond what is necessary for the exercise of his command. He has no capacity to treat for the definitive cession of the

The right to conclude a capitulation.

¹ Bonfils, *op. cit.* sec. 1259.

² French *Manuel à l'Usage*, p. 65.

³ *R.D.I.* September-October, 1898, p. 816.

place under his command, for the surrender of a territory, for the cessation of hostilities in a country situated beyond the sphere of his authority.¹ He has power to conclude a military convention but none to make or agree to terms of a political nature or such as will take effect after the termination of hostilities. In March, 1865, Lee wrote to Grant proposing a meeting at which it should be arranged to "submit the subjects of controversy between the belligerents to a military convention." This letter Grant sent on to Stanton, the War Minister. In reply, Grant received the following letter, which was written by Lincoln himself but signed by Stanton:—

The President directs me to say to you that he wishes you to have no conference with General Lee, unless it be for the capitulation of Lee's army, or on solely minor or purely military matters. He instructs me to say that you are not to decide, discuss or confer upon any political question. Such questions the President holds in his own hands and will submit them to no military conferences or conventions. Meantime you are to press to the utmost your military advantage.²

The extent and limitations of the powers which the commander of the army of a constitutional country has as regards capitulations are accurately expressed in this letter.

A capitulation once signed, it must be adhered to.

The capitulation once signed, the terms of the contract must be strictly observed. "So soon as a capitulation is signed," says paragraph 146 of the *American Instructions*, "the capitulator has no right to demolish, destroy or injure the works, arms, stores or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same." Sometimes a clause to this effect is inserted in the conditions but it is unnecessary, being implied in the contract. "It is an implied condition in the capitulation of a place that the capitulating force shall not destroy its fortifications or stores after the conclusion of the agreement."³ The second article of the capitulation of Metz provided that—

The fortress and town of Metz, with all the forts, the material of war, stores of all kinds, and all public property, will be handed

¹ French *Manuel à l'Usage*, p. 65.

² Draper, *American Civil War*, Vol. III, p. 561.

³ Professor Holland's note to Article XXXV in British official *Laws and Customs of War*. See, too, French *Manuel* (p. 64).

over to the Prussian Army in the same condition in which it stands at the time of signing this agreement.¹

Article 4 of the act of capitulation of Port Arthur in 1905 laid it down that—

If it is discovered that the Russian army has destroyed or modified in any manner the state in which the articles enumerated in article 2 [forts, batteries, ships of war, vessels, arms, flags, horses, munitions of war, monies and other public property] happen to be at the moment of the signature of the capitulation, the Japanese army will consider the present negotiations null and will resume its liberty of action.²

At the meeting to discuss the terms of capitulation, the Russian plenipotentiary requested that a delay of three hours might be granted before this article was to take effect. The Japanese representative could not agree, but it was arranged that, when the agreement was signed, a letter should be despatched at once to General Stoessel, and that the duty of preventing all destruction should commence an hour and a half after the despatch of this letter.³ Stoessel, has been blamed by uninformed writers in the Press for destroying war material during the negotiations for the surrender. Had he done so, he would have done no wrong: but as a matter of fact, he seems to have destroyed nothing but the flags: ⁴ a very capable correspondent relates that no effort was made by the Russians to destroy the forts in the west or even to damage the guns, before evacuating them, and he asks—"Surely it is no small responsibility for a general to surrender a fortress intact when he might have destroyed the defences and guns without alteration in the subsequent terms."⁵ The basis of the newspaper complaints against Stoessel is the fact that during the negotiations some fires broke out in the city and on the Japanese representative pointing this out to his Russian colleague, the latter sent back a message requesting that they might be stopped. It was purely a special arrangement between the belligerents; the Russians agreed to put out the fires if the Japanese suspended hostilities.⁶ A commander

The case of the capitulation of Port Arthur in 1905.

¹ German Official *History*, Part II, Vol. I, Appendix 78.

² Ariga, *op. cit.* p. 310.

³ *Ibid.* pp. 309-310.

⁴ *Ibid.* p. 309.

⁵ Ashmead-Bartlett, *Port Arthur*, p. 437.

⁶ Ariga, *op. cit.* p. 313.

who has brought a fortress to the point of capitulating, may make the non-destruction of property during the negotiations a condition for granting better terms, and it may suit the besieged's interests to meet him in the matter. In the absence of such a special arrangement, the commandant has a perfect right to dispose as he chooses of his *matériel* up to the moment of the signing of the act of capitulation.¹ On 12th December, 1870, the French commandant of Phalsbourg capitulated unconditionally; he had offered to capitulate before on condition of being allowed to march out with arms and baggage, and on this offer being refused, he destroyed all the war munitions in the place, including 12,000 muskets with 800 rounds of cartridge for each, and huge stores of gunpowder. He was honoured for his soldierly conduct by friend and foe alike. Though he had surrendered at discretion, the Germans allowed the garrison the privileges which usually accompany a capitulation "with the honours of war," and two years later the French commission of inquiry decreed a special vote of thanks to the commandant and garrison.² Bazaine was tried by a council of war for surrendering Metz and was sentenced to death³ and military degradation for treating with the enemy "without having previously done all that duty and honour prescribed." Among the charges for which he was tried and condemned was that of *failing to destroy his arms and ammunition before surrendering*.⁴

The famous capitulation of Metz.

In a General Order addressed to the army of the Rhine after the completion of the preliminaries of capitulation, Bazaine urged his troops to "shun acts of indiscipline, such as destruction of arms and *matériel*, since, according to military usages, places and armaments will be restored to France when peace is signed."⁵ If the reason given here is unsound, the advice is unimpeachable. Bazaine's attitude *after* the capitulation was strictly correct, but there was nothing in war law, usage, military tradition or etiquette, to prevent his destroying his munitions

¹ Pillet, *op. cit.* p. 362.

² Cassell's *History*, Vol. II, p. 41; Bonfils, *op. cit.* sec. 1265.

³ The death sentence was commuted to 20 years' imprisonment but Bazaine escaped to Italy and finally died at Madrid.

⁴ G. T. Robinson, *The Betrayal of Metz*, pp. 364, 375-8.

⁵ Hozier, *Franco-Prussian War*, Vol. II, p. 121; Cassell's *History*, Vol. I, p. 296.

before the capitulation. Not even the eagles were destroyed, though they had been returned to the arsenal to be burnt;¹ 53 of them fell into the hands of the Germans, as well as 400 pieces of artillery and 100 mitrailleuses.² The whole story of Metz is still a mystery. Did Bazaine fail in loyalty or only in nerve? It is hard to conceive him failing in either, this war-tried veteran of three continents, who had fought his way from drummer to Marshal and owed nothing to fate or fortune. He, if any Frenchmen of his time, might have been expected to play the same part at the great fortress on the Moselle which the grim Alsatian Rapp had played at another gate of Napoleonic France—Dantzic on the Vistula—sixty-three years before. This, at any rate, is certain—he was tried by his peers, and the record stands written and signed. Whether Bazaine lost his love of France when the eagles were taken out of the flag, or whether he was constitutionally or morally unfitted for the position which circumstances had assigned him to, there is no questioning the verdict of the council of war, that he failed in his military honour and duty. One cannot help picturing the blackened ruins of forts and the heaps of scrap-iron guns that Tottleben or Osman would have left as spoil of war to the Germans had they been in his place. Only the grant of very favourable terms could have justified the surrender of so rich a prize as Metz, with all its wealth of warlike *matériel* intact. Williams, the gallant Englishman who held Kars for the Turks in 1855, handed over the fortress intact to the Russians, but then he surrendered with the honours of war and on advantageous terms. He had threatened to burst all his guns if Mouravieff insisted upon an unconditional surrender.³

The same principles which apply to the *matériel* of a fortress which has capitulated are applicable also in the case of the *personnel*. Once the capitulation is signed, the position is stereotyped and fixed; the *status quo* of the moment of signature must be honourably maintained. The victorious belligerent is justified in expecting that not only the *matériel* but the *personnel* of the capitulating force shall be handed over to him

Personnel of a capitulating force should be surrendered intact.

¹ German Official *History*, Part II, Vol. I, p. 201.

² Cassell's *History*, Vol. I, p. 293.

³ Nolan, *War against Russia*, Vol. II, p. 532.

in accordance with the terms of the convention. After the capitulation of Metz and before the actual surrender, over 1,000 French officers made their escape¹—some, it is said, because they thought it a dishonourable condition to require of them a written *parole d'honneur*.² Yet one may question whether they did not dishonour themselves more by escaping as they did than they would have done by signing their names to a parole. Before the capitulation they might have legitimately escaped (if they could), or after the actual surrender, but to withdraw at the time they did was to fail in that strict good faith which is required in the execution of a military convention.

Capitu-
lating
troops
become
prisoners
of war.

Troops which have capitulated become prisoners of war, but sometimes the terms of the capitulation provide for some or all of them retaining their liberty. When Belfort surrendered in February, 1871, the garrison were allowed "free withdrawal with the honours of war, in recognition of their brave defence," and they marched out with their "eagles, colours, arms, horses, carriages, military telegraph apparatus, as also the baggage of the officers and kits of the men, and the archives of the fortress."³ At Potchefstroom, which capitulated "with all the honours of war" in 1881, the troops were allowed to pass into British territory.⁴ But at Manila in 1898 the troops became prisoners of war, though they had capitulated "with the honours of war;" however, as peace followed at once, they were sent back to Spain immediately and not brought into captivity.⁵ Article 2 of the convention for the capitulation of Kars in 1855 provided that "the garrison of Kars, with the Turkish commander-in-chief, shall march out with the honours of war and become prisoners."⁶ Unless it is otherwise stipulated in

¹ Cassell's *History*, Vol. I, p. 304.

² Robinson, *Betrayal of Metz*, p. 336.

³ German Official *History*, Part II, Vol. III, Appendix 172.

⁴ Bellairs, *Transvaal War*, 1880-81, p. 272.

⁵ Titherington, *op. cit.* p. 377.

⁶ Nolan, *War against Russia*, Vol. II, p. 532. The form of capitulation which was given in the 1899 edition of the British *Manual of Military Law*, p. 1881, but not reprinted in the Edition of 1907, contained the following clause, supported by references in the margin to Martens' *Recueil de Traités*:—"The garrison shall march out from thegate at (10 a.m.) on theday of with all the honours of war, including colours flying and drums beating, and shall lay down their arms on the glacis, and shall be transported as prisoners of war to such places as may be decided upon."

the terms of surrender, a capitulating garrison must be considered as ordinary prisoners of war. Usually, however, as an act of grace, the officers and functionaries of similar standing are allowed to return to their homes on giving their *parole d'honneur* and there are a few instances of the same privilege being extended to the rank and file. I shall deal with the whole question of paroling in the next chapter.

The war *matériel* and public properties and monies of a fortress or force which has capitulated pass to the conqueror. Private property, except arms, horses, and military papers, are free from appropriation under Article IV of the *Règlement*. Usually, officers are allowed to retain their swords, and when the capitulation is "with the honours of war," the men keep their arms as well.¹ General Voigts-Rhetz, the first military delegate of Germany, suggested at the Brussels Conference that to allow officers to keep their swords while depriving the soldiers of their weapons was to introduce a dishonourable condition into an armistice, but he was not supported by the other delegates, and the practice is a common one.² If, as in the British army, the officers' arms are their private property while the men's are provided out of public funds, the practice is logical as well as courteous. After the Port Arthur capitulation, some difficulty arose as to the interpretation of Article 7 of the convention of surrender, which allowed the Russian officers *à porter leurs épées*. The officers who went to Japan as prisoners of war, in preference to giving their parole, claimed that they had the right to *wear* their swords. Professor Ariga admits that the word *porter* is misleading; the word *emporter* (*l'épée*), as used at Metz, or *conserver* (Sedan), or *emmener* (Belfort), would have been clearer. But as Article VIII of the *Règlement* lays down that prisoners of war are subject to the laws, regulations, and orders in force in the army of the capturing State, and as no one in Japan is allowed to wear a sword except military and civil functionaries in uniform, the words of the act of capitulation were ruled by the authorities to confer merely a right of property in the swords.³ Horses,

Usual to allow officers to retain their swords ;

¹ At Potchefstroom in 1881—a capitulation with honours—the men's rifles were surrendered, but this is unusual.

² Brussels B.B. p. 208.

³ Ariga, *op. cit.* p. 319.

but not
their
horses.

even when private property, are usually sequestered. In this respect the practice of the Secession War was more generous than that usually followed in Europe. At Vicksburg, mounted officers kept their horses, and at Appomattox the same privilege was granted to the men who owned horses or mules—they would want the animals for putting in a crop, Grant said.¹ General Stoessel wished to present his charger to General Nogi after the fall of Port Arthur, but the latter courteously intimated that he could not accept the animal, as it was necessary to hand it over to the Japanese Commissioner along with the other horses: he promised, however, that he would obtain it afterwards through the proper issuing channel and he would keep it, as General Stoessel desired.² If public horses are not confiscated and if private chargers are not sequestered, it is owing to an act of grace on the part of the victorious belligerent, who is under no obligation founded on convention or usage to allow the concession. Horses are too valuable a means of war to be assimilated to ordinary private property.

Private
property
of garrison
is immune.

Although officers and men have a right to their personal property, practical considerations require a limit to be put to the nature and extent of the property which they shall be allowed to take with them. The Confederate officers at Vicksburg claimed the right to take their slaves as "private property"; to this Grant naturally demurred; he could not be expected to endorse the view that a black slave and a black portmanteau were, in essence, one and the same.³ As to the amount of baggage each officer and soldier can take with him, the rule followed by the Japanese at Port Arthur appears the most commendable. They allowed the men to take away their tents and "necessary personal effects," the officers to take their baggage within the limits of the weights fixed for corresponding ranks in the Japanese army, but reasonable excesses were not objected to.⁴ Such property as had to be left at Port

¹ Grant, *Memoirs*, p. 632. The form of capitulation given as an example in the 1899 edition of the *British Manual of Military Law*, allows officers, whether paroled or not, to retain their horses; but no such privilege was granted to the Boers who surrendered with Prinsloo or on other occasions during the last South African War.

² Kinkodo Company's *History*, p. 946.

³ Draper, *American Civil War*, Vol. III, p. 52.

⁴ Ariga, *op. cit.* p. 312.

Arthur was to be entrusted to the Russians who remained in the Hospitals or to the ordinary inhabitants of the town. General Stoessel and many other officers handed over their effects to the European merchants of the new town. At Metz, the baggage left behind by the French officers was protected by the Germans and permission was granted to the owners to remove it within six months after the establishment of peace or their being set at liberty. A somewhat less liberal arrangement was necessary at Port Arthur, a town which was not, like Metz, situated in the midst of a civilised country and which had, too, to be made ready for a possible attempt to retake it. Furthermore, Japan needed all her soldiers for the Manchurian War and could not spare a garrison to protect the private property left in Port Arthur from the robbing of the Chinese and Chunchuses. The Japanese Commission declined, therefore, to assume any responsibility as regards the private property of the Russian officers.¹

In the following tabular statement I have tried to show the manner in which certain forms of public and private property have been treated in some modern capitulations. The terms of the capitulations are not always very full or very clear but, so far as it goes, the statement is, I think, useful and instructive as a rough guide.

Table
showing
treatment
of
property
of capitulating
forces

¹ Ariga, *op. cit.* p. 325.

TABULAR STATEMENT SHOWING HOW CERTAIN FORMS OF

Capitulation.	War matériel, etc.	Arms of Troops.	Officers' Swords.	Officers' Private Property.
Kars (1855)	Surrendered.	Surrendered.	Retained.	Retained. ¹
Vicksburg (1863) ...	Surrendered.	Surrendered.	Retained.	Retained.
Appomattox (1865) .	Surrendered.	Surrendered.	Retained.	Retained.
Sedan (1870)	Surrendered.	Surrendered.	Retained by paroled officers, others not mentioned.	Retained by paroled officers, others not mentioned.
Strasburg (1870) ...	Surrendered.	Surrendered.	—	Retained.
Metz (1870)	Surrendered.	Surrendered.	Retained.	Retained.
Belfort ³ (1871) ...	Eagles, colours, carriages, telegraph apparatus retained, other matériel surrendered.	Retained.	Retained.	Retained.
Bitsche ³ (1871) ...	Fortress artillery surrendered, rest retained.	Retained.	Retained.	Retained.
Avliar (1877) (Mukhtar Pasha's capitulation).	Surrendered.	Surrendered.	Retained.	Retained.
Wei-hai-wei (1895) ...	Surrendered.	Surrendered.	Surrendered. ⁴	Retained.
Santiago (1898) ...	Surrendered.	Surrendered. ⁵	Retained.	Retained.
Manila ⁶ (1898) ...	Surrendered.	Retained.	Retained.	Retained.
Verliesfontein ⁷ (1900) (Prinsloo's capitulation).	Surrendered.	Surrendered.	None.	Retained. ⁸
Port Arthur (1905)...	Surrendered.	Surrendered.	Retained.	Retained.

The terms of the Belfort capitulation provided for the archives of the fortress being taken by the documents, up to a limit of 50 lbs. per Regiment, and

PROPERTY HAVE BEEN DEALT WITH IN RECENT CAPITULATIONS.

Troops' Private Property.	Officers' Horses.	Troops' Horses.	Remarks and Authority.
Retained. ¹	Surrendered.	Surrendered.	¹ "The private property of the whole garrison shall be respected" (Article 3). Nolan, <i>War against Russia</i> , Vol. II, p. 532.
Clothing, but no other property retained.	Mounted officers, one horse each.	Surrendered.	Grant, <i>Memoirs</i> , pp. 329-331.
—	Privately owned horses retained.	Privately owned horses and mules retained. ²	² The Confederate troopers owned their horses. Grant, <i>Memoirs</i> , p. 631.
—	Surrendered.	Surrendered.	German <i>Official History</i> , Pt. I, Vol. II, Appendix 49.
Retained.	Surrendered.	Surrendered.	German <i>Official History</i> , Pt. II, Vol. I, Appendix 59.
Retained.	Surrendered.	Surrendered.	German <i>Official History</i> , Pt. II, Vol. I, Appendix 78.
Retained.	Retained.	Retained.	³ A capitulation "with the honours of war." German <i>Official History</i> , Pt. II, Vol. III, Appendix 172.
Retained.	Retained.	Retained.	³ A capitulation "with the honours of war." <i>Kriegsbrauch im Landkriege</i> , p. 39.
Retained.	Retained.	Surrendered.	De Martens, <i>La Paix et la Guerre</i> , p. 418.
—	Surrendered.	Surrendered.	⁴ It was specially provided that officers' swords should be given up, even if private property. Takahashi, <i>Cases on International Law during Chino-Japanese War</i> , pp. 129-133.
Retained.	Surrendered.	Surrendered.	⁵ The Spaniards made a hard fight for the retention of the men's arms, but the U.S.A. refused to concede the point. Titherington, <i>Spanish-American War</i> , pp. 310-312.
—	Retained.	—	⁶ A capitulation "with the honours of war." Titherington, p. 376; R.D.I September-October, 1898, p. 806.
Retained. ⁸	Surrendered.	Surrendered.	⁷ I give this example as Cronje's surrender at Paardeberg was unconditional. ⁸ "Private goods not to be confiscated" (Article 1 of the terms of capitulation). <i>Times History</i> , Vol. IV, p. 340.
Retained.	Surrendered. ⁹	Surrendered.	⁹ Permission for each officer to take a horse was asked for and refused, but an orderly was allowed to accompany each officer. Ariga, <i>Russo-Japanese War</i> , pp. 309-311.

evacuating troops; those of the Port Arthur capitulation for each Regiment taking its papers and subject to examination by the Japanese authorities.

CHAPTER X

PRISONERS OF WAR

Conventional Law of War, Hague Règlement, Articles IV to XX.

ARTICLE IV.

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE V.

Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist.

ARTICLE VI.

The State may utilise the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive, and shall have no connection with the operations of the war.

Prisoners may be authorised to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons, the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

ARTICLE VII.

The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE VIII.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ARTICLE IX.

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule he is liable to have the advantages given to prisoners of his class curtailed.

ARTICLE X.

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound on their personal honour scrupulously to fulfil both towards their own Government and the Government by whom they were made prisoners the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE XI.

A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE XII.

Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the Courts.

ARTICLE XIII.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ARTICLE XIV.

A Bureau for information respecting prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this Bureau to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The Bureau must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the Information Bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE XV.

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country, and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents, every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of orders and police which the latter may issue.

ARTICLE XVI.

Information Bureaux enjoy the privilege of free postage. Letters, money-orders, and valuables, as well as parcels by post, intended for prisoners of war, or despatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE XVII.

Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

ARTICLE XVIII.

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever Church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

ARTICLE XIX.

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE XX.

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

IN the first sentence of Article IV one may see an allusion to an ancient prerogative of the warrior—the right of the individual soldier to the captive of his bow and spear. When war supported war and men fought for what they could make out of fighting and not for a shilling a day or its variants, the capture of spoil and prisoners was a matter of great moment to the professional soldier who lived by his trade and guarded his rights and perquisites as jealously as the modern gratuity-paid waiter. A prisoner was then a valuable asset as representing potential ransom-money. Originally the prisoner's value was governed by the ordinary economic law of supply and demand ;

The ancient practice of ransom.

he fetched a high or a low price according to the state of the market in prisoners. Then a more or less definite scale was introduced. In the 17th century, the ransom of a prisoner of superior rank appears to have been fixed at the equivalent of a year's income; that of a prisoner of inferior rank was one to three months' pay.¹ "Sometimes prisoners whose ransoms had been fixed were given away as presents or transferred in payment of a debt like banknotes or bills of exchange."² At the end of the 18th century, England and France arranged a tariff to govern the exchange and ransom values of prisoners of war. A French Marshal or an English Admiral was assessed at 60 men and the ransom value of a man was a pound sterling, so that a Marshal or an Admiral was valued at £60.³ Meanwhile, as the custom of paying troops for their services was introduced, the taking of prisoners came to be regarded as part of the day's work for which the soldier was paid and the prisoner was appropriated by the belligerent sovereign to his own uses, and he, and not the actual captor, benefited by the ransom money. One may see the change in process in the army regulations of Gustavus Adolphus, who left prisoners of inferior grade to the takers but reserved such tit-bits as superior officers for himself, recompensing the captor.⁴ The system of ransoming is now long obsolete in civilised war. It savoured too much of chattel-slavery on the one hand, and of the methods of the Macedonian brigand on the other, to commend itself to modern ideas.⁵

Improved
treatment
of
prisoners
in modern
times.

The second sentence of the Article is also one which reminds one of "old, unhappy far-off things and battles long ago." It calls up a picture of the cruelty, torture, slavery, which were the lot of the unfortunate captive in the wars of the good old days. One may almost hear in it the clank of the chain and the swish of the thong. In nothing connected with war has a greater improve-

¹ Hall, *International Law*, p. 410.

² Lawrence, *International Law*, p. 334.

³ *Ibid.* p. 334.

⁴ Hall, *International Law*, p. 410.

⁵ A modified form of ransom is recognised by the *American Instructions*, which lay down (Article 108) that—"The surplus number of prisoners remaining after an exchange has taken place is sometimes released for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessities."

ment been wrought than in the treatment of prisoners of war. One need not go back to the times when prisoners were enslaved to appreciate the magnitude of the change. A hundred years ago, England, while she prayed in her national Liturgy for "all prisoners and captives," had no compunction about confining the French prisoners of war in noisome hulks and feeding them on weevily biscuit, salt junk and jury rum, which sowed the seed for a plentiful harvest of scurvy, dysentery, and typhus.¹ To-day the prisoner of war is a spoilt darling; he is treated with a solicitude for his wants and feelings which borders on sentimentalism. He is better treated than the modern criminal, who is infinitely better off, under the modern prison system, than a soldier on a campaign. Under present-day conditions, captivity—such captivity as that of the Boers in Ceylon and Bermuda and of the Russians in Japan—is no sad sojourn by the waters of Babylon; it is usually a halcyon time, a pleasant experience to be nursed fondly in the memory, a kind of inexpensive rest-cure after the wearisome turmoil of fighting. The wonder is that any soldiers fight at all; that they do so, instead of giving themselves up as prisoners, is a high tribute to the spirit and the discipline of modern armies.

Prisoners must be treated with humanity. I have already referred to the right sometimes claimed for a commander of destroying prisoners whom he finds it inconvenient to keep.² To do so in civilised war would be simply sheer barbarity, excusable on no conceivable ground. The second Spanish delegate at Brussels asked for the insertion of a clause providing that:

The execution of prisoners of war: only allowable if they resist.

Troops escorting a convoy of prisoners of war may not execute them, even in the case of their being attacked during their march by the hostile force, with the object of rescuing the prisoners. But if the prisoners take part in the combat in any way they forfeit by this act their character of prisoners of war.

The Committee held that the Spanish proposition was met by the general provision prescribing humane treatment and simply recorded the proposition in the Protocol as a "gloss" on

¹ Lieutenant-Colonel J. Cooper-King, *The Story of the British Army*, p. 203.

² *Vide supra*, pp. 88-90.

the text.¹ It clearly contains an implied and unwritten law of war. The second sentence indicates very properly the conditions upon which the immunity of a prisoner of war depends. He must not take any part whatever in a combat; if he continues to resist he becomes again an active enemy and may be killed. And his resistance need not be an overt act of violence, to warrant summary measures being taken with him. When De Wet captured the British transport and "U" Battery of Horse Artillery at Sannah's Post in March, 1900, by concealing his men in the bed of the Koornspruit and capturing the waggons and guns, one by one, as they came down the sloping bank to cross the river and regain Bloemfontein, it was essential to his success that the whole thing should be done silently. The Kaffir drivers of the transport waggons were terrorised into silence, and the gunners and drivers of the Artillery were disarmed and warned not to call out or signal to their comrades in any way, on pain of being shot.² They obeyed; had they not done so, it cannot be questioned that the Boers would have been justified in shooting them—not in revenge, but because they continued an act of war by trying to aid their uncaptured comrades and thus endangering their captors. If a prisoner of war makes himself dangerous, he loses his privileges as such. But no such justification can be alleged for such a wanton act as a Chilian officer is stated to have committed in the war with Peru. Lieutenant Struven captured forty-eight Peruvian prisoners in 1882, and, because, they hampered his movements by their presence, killed them in cold blood.³ Such things are not done in good war, though one expects to find them occurring when South Americans fight for so elevating a cause as the ownership of a guano patch. They are bad policy, as well as being inhumane, for bloody reprisals are bound to follow. In the fighting between the Imperialists and the Republicans in Mexico in 1865-6, "11,000 men of every rank in the Republican army, ranging from General to common soldier, were shot down in cold blood, after falling prisoners of war, without the

¹ Brussels B.B. p. 212.

² De Wet, *Three Years' War*, p. 89; *Times History*, Vol. IV, pp. 37-8.

³ Markham, *War between Peru and Chili*, p. 270.

slightest inquiry of any description.”¹ When, in turn, the unhappy Emperor Maximilian, who had authorised the execution, found himself in the power of Juarez, the Republican leader, he paid the penalty for his inhumanity. He was sentenced to death and shot at Queretario in June, 1867, and, for all his virtues, one cannot pity him.² It is simply cold-blooded murder to shoot a prisoner unless he has forfeited his immunity by some definite act of resistance or hostility. The British *Field Service Regulations* (Pt. II, section 97 (2)) allow prisoners to be fired upon if they resist their escort. And the French Manual, *Service des Armées en Campagne* (sect. 121), authorises the guards of a convoy of prisoners attacked on the march to order the prisoners to lie down and to fire upon any who rise after having received the order.

As General de Voigts-Rhetz pointed out at Brussels, there are occasions when it is absolutely necessary to use violence against prisoners of war—as, *e.g.*, if they refuse, during a battle, to go to the place assigned to them.³ In all such cases, the rule as to humane treatment does not forbid their being summarily dealt with—shot, *in terrorem*, if necessary. There is also the very vexed question of reprisals affecting prisoners of war; with this I shall deal in a later chapter.

Prisoners of war must not be interned in unhealthy localities. A specific proposal to this effect was put forward at Brussels by the Spanish delegation, but was not pressed when a delegate pointed out that it was covered by the provision as to humane treatment.⁴ During the Anglo-Boer War the inhabitants of St. Kitts, West Indies, petitioned that Boer prisoners might be sent to that island; the British Government declined to accede to the request, as the island was “subject to filariasis, which is an early stage of elephantiasis.”⁵ Prisoners must be treated humanely; suffering, whether physical or mental, must not be inflicted upon them wantonly. The world has moved on since the days when “the mile-long triumph,” with its array of

Prisoners must not be interned in unhealthy places; they must be properly fed, clothed, etc.

¹ W. Harris Chynoweth, *The Fall of Maximilian*, p. 52.

² Fyffe, *Modern Europe*, Vol. III, p. 399.

³ Brussels B.B. p. 212.

⁴ *Ibid.* p. 213.

⁵ Wyman's *Army Debates*, session 1902, Vol. II, p. 385.

chained prisoners, followed a Roman consul to the Capitol. They must be properly clothed, fed, and housed.

It must, however, often happen that prisoners have to be put on short commons when first captured. They come, like uninvited guests, to share the commissariat of an army which has provided supplies for its own needs only, and they cannot complain if they have to take "pot-luck" at first. And when the capturing army is itself on short rations, it cannot effect the impossible and create luxuries for its prisoners out of aery nothing. In part, the hardships suffered by the Union prisoners in the Secession War are to be explained by such considerations as these. But no such justification can be put forward for the condition of the permanent camps in the South; the ill-treatment of the prisoners at Andersonville, Libby, and Belle-Isle was due to sheer bungling and criminal indifference on the part of the Richmond authorities. There was a bitter controversy at the time over this matter, and I think a somewhat detailed examination of the subject will not be a waste of time, if only for the purpose of comparing the treatment of the Union prisoners by the Confederates with that of the Russian prisoners by the Japanese in 1904-5. It is useful sometimes to compare improper and proper methods of doing a thing.

Treat-
ment of
Union
prisoners
in 1863-5.

It may be at once admitted that there were insuperable difficulties in the way of providing adequately for the prisoners while they were at the front. The Confederate soldiers who fought from 1863-5 were probably the worst-fed soldiers who ever fought on this planet. The great army of Northern Virginia, which "carried the revolt on its bayonets," was an army of "tattered uniforms and bright muskets," and, to put it plainly, of empty stomachs.¹ When it lay shivering along the Rappahannock from December, 1863, to March, 1864, the ration in this army was a quarter pound of fat pork with a little meal or flour, and very frequently the pork only was dealt out, or perhaps the meal, or a bundle of crackers (biscuits).² Until provisions failed, the Secessionists appear to have treated their prisoners well. In a letter written in June, 1862, McClellan

¹ The words in inverted commas are from Swinton's *Army of the Potomac*, p. 16.

² White's *Lee*, p. 333.

said: "I must do secesh the justice to say that they now treat our wounded and prisoners as well as they can."¹ When Ewell's corps had to cross the Potomac after Gettysburg, the river was swollen breast high by the rains, and the soldiers forded it with great difficulty, owing to the mud and slime of the swift current. "Most of our wounded," says Gordon, "and our blue-coated comrades who accompanied us as prisoners were shown greater consideration—they were ferried across in boats."² Lee himself gave orders that "the wants of the prisoners should be first attended to, as from their position they could not save themselves from starvation by foraging or otherwise, as the army could when in straits for provisions."³ But when the Confederates had nothing to give their prisoners, as often happened towards the end, there was a great deal of unavoidable suffering among the latter. Lee had a thousand prisoners with him when he made his last despairing march westwards from Richmond, only to find that the supply trains which had been ordered to meet him at Amelia Court House had been sent elsewhere, and these men had perforce to satisfy their hunger with parched corn—there were no other rations in the army.⁴ When even this sorry substitute for rations failed, "the men had nothing to eat except the young shoots of the forest trees."⁵ What can a commander do in such circumstances as these? Over and over again the Confederate authorities had endeavoured to induce Lincoln and Grant to revert to the system of paroling and exchanging prisoners which had been in force at first, but was abandoned in 1864. Even when the Confederate Exchange Commissioner, Judge Ould, offered to hand over some fifteen thousand sick and wounded prisoners without an equivalent, provided transportation was furnished, the offer was refused.⁶ The policy of the Washington authorities was intelligible enough; the South needed men, the North did not, and to have relieved the Confederates of the necessity of guarding, clothing, and feeding their prisoners would have meant a saving to the South of both men and

Difficulty
of pro-
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ade-
quately
for their
needs.

¹ *McClellan's Own Story*, p. 402.

² Gordon, *Reminiscences*, p. 173.

³ R. E. Lee's *Lee* p. 230.

⁴ *Ibid.* p. 152; Fitzhugh Lee's *Lee*, p. 395.

⁵ Draper, *op. cit.* Vol. III, p. 586.

⁶ White's *Lee*, p. 444.

supplies, both badly needed for the fighting line. In the North itself the policy of non-exchange was not suffered to go without protest. It was denounced, partly no doubt for purely political reasons, by the Democrats who supported McClellan for the Presidency in 1864. The fifth plank of the Democratic platform ran—"Resolved that the shameful disregard of the administration to its duty in respect of our fellow citizens who now are, and long have been, prisoners of war in a suffering condition deserves the severest reprobation, on the score alike of public policy and common humanity."¹ But Lincoln and Grant were adamant, and the policy was maintained. The prisoners at Richmond, Belle-Isle, and Andersonville were the pawns in a great match, and had to be sacrificed to the rigour of the game.

The state
of the
prisoners'
camps at
the South.

The northern administrators knew of their sufferings and privations, and, knowing, disregarded them, and to this extent they are chargeable with responsibility for what happened. But a far larger measure of blame attaches to the Confederate Government. There was no proper supervision of the internment camps, and no one in authority appears to have made it his business to see that they were managed as they ought to have been. "Sufficient information," Lee wrote in 1866, "has, I think, been officially published to show that whatever sufferings the Federal prisoners at the South underwent were incident to their position as prisoners, and produced by the destitute condition of the country, arising from the operations of war."² Assuredly Lee's honest belief is expressed in these words, but on his own showing he knew nothing of the actual state of affairs at the camps. "As regards the treatment of the Andersonville prisoners to which you allude," he wrote, also in 1866, "I know nothing and can say nothing of my own knowledge. I never had anything to do with any prisoners except to send those taken in the fields when I was engaged to the Provost Marshal General at Richmond."³ The very state of the Andersonville camp shows that Lee could not have known how it was administered. Dr. Draper draws a dark picture of the life there. Over 30,000 prisoners were cooped up in a narrow space; there was no shelter from the sun or the cold

¹ White's *Lee*, p. 393.

² *Ibid.* p. 444.

³ R. E. Lee's *Lee*, p. 223.

but what the men could improvise for themselves; every possible disease was rampant; the prisoners were largely naked; the dead were pitched into a ditch and covered with quicklime; the smell of the dreadful stockade extended for two miles.¹ One of the most piteous human documents on record is an extract which Draper quotes from the diary of a soldier of the 47th New York who was confined at Andersonville. It is as follows:—

March 26.—No rations to-day. March 27.—Rations not served till 3 o'clock. April 1.—No rations issued. April 2.—Rations issued at 5 p.m.; meal and mule flesh. April 10.—No meat. April 27.—Man shot for getting over the line. May 2.—Our friend the Cavalryman shot. May 15.—The singular cripple Chickamauga shot dead. July 3.—No rations. July 4.—Rations full of maggots; had to be thrown away. July 13.—Man shot at dead-line. Aug. 6.—Man went to the brook, reached over the line with a pole and cup, and was shot dead; water coloured with his blood. Sept. 10.—My God! My God! Why hast thou forsaken me?²

The jailer, Wirz, was subsequently tried by the U. S. Government for committing murders with his own hands, condemned, and hanged.³ The wretched condition of the prisoners may be judged from the nature of the supplies which Sherman obtained General Hood's permission to send through to Andersonville in September, 1864, as being most needed there; they were, *inter alia*, "1,200 fine-tooth combs and 400 pairs of shears for cutting hair."⁴ However great were the difficulties in the way of providing adequately for the great number of prisoners in the South, it cannot but be admitted that the story of Andersonville is a very dark page in the history of the Confederacy. The state of affairs at the camp was known, or might have been known, at Richmond, for Colonel Chandler, inspector-general of the Confederate army, inspected the camp and reported upon its administration in no halting terms. "It is a place," he said, "the horrors of which it is difficult to describe

¹ Draper, *op. cit.*, Vol. III, pp. 510-3.

² *Ibid.* p. 514.

³ *Ibid.* p. 514.

⁴ Sherman, *Memoirs*, Vol. II, p. 142. The supplies did not reach Andersonville in time, for the prisoners were removed soon after this, and received the much-needed articles finally only just before the close of the war (do., p. 143).

—it is a disgrace to civilisation.”¹ His report might have been the report of a British Royal Commission, so sterile was it of any good result. The Confederate authorities cannot be relieved of their responsibility by the argument that Lincoln might have emptied Andersonville at any moment by withdrawing the embargo on exchanges. Lincoln’s policy was a stern one, which sought the ending of the war and the ultimate good of the whole nation, and was indifferent meanwhile, as great policies must often be, to the sufferings of individuals; but he was entirely within his rights in acting upon such a policy if he chose. It is within a belligerent’s discretion to decline to allow exchanges or paroles, and if he does decline, that does not free the other belligerent from his obligation to treat his captives with humanity. Such an obligation was not created at the Hague. It would exist, and did exist, if no International Conference had ever sat. The worst hardships which the Federal prisoners suffered were due, not so much to the failure of supplies, as to the brutality of their guards, the filth of the camp, the want of the ordinary necessities for health and cleanliness—all matters which proper supervision would have put right. The Richmond Government was not less enlightened than the Government of the late South African Republic, yet the latter displayed a far higher standard of humanity under not dissimilar circumstances in 1900. After the English prisoners were removed from Pretoria, they were confined at Nooitgedacht in the Eastern Transvaal, and there they were “so badly housed and so badly fed that Viljoen himself was ashamed of the treatment they had received from his Government. This general, on his arrival at Nooitgedacht, where he found the 2,000 prisoners under a guard of fifteen Boers, asked the President what he should do with them. He was told to release them, which he did after a few genial words of greeting.”²

Humane
and
notable
precedent
set by
General
Viljoen.

Treat-
ment of
prisoners
of war by
the Boers.

There appears to have been little to complain of in the treatment accorded to the British prisoners in the war last referred to up to the commencement of the guerilla operations. After, they fared well or ill according to the clemency or

¹ Draper, *op. cit.* Vol. III, p. 513.

² *Times History*, Vol. IV, p. 457.

severity of the particular commandant into whose power they chanced to fall. Some of the Boer generals, like Viljoen and De la Rey, displayed the highest chivalry and consideration for their captives. On one occasion, De la Rey flogged some of his men for ill-treating their prisoners.¹ De Wet states that he made no difference between his own men and the British prisoners;² in which case he cannot have been an ideal commander to serve under, for he undoubtedly dismissed a body of prisoners in a very miserable and destitute state on the Basutoland border at the beginning of the year 1902.³ It was in the "stripping" (*uitschudden*) of the prisoners that the Boers ^{The} *uitschudden* ^{den.} offended most against the canon of war usage. The serviceable uniforms of the captured soldiers were too tempting a prize for men who were in rags and who had no other means of refitting; and there is some force in De Wet's contention that the seizure was justified by the British practice of removing or burning all the clothes left in the farms and even of taking the hides out of the tanning tubs and cutting them in pieces.⁴ For some considerable time the Boers, like the Confederates in the Secession War, trusted to their captures for the renewal of their wardrobes. Sometimes the victims were dismissed with nothing but a shirt; sometimes, if a British column was dangerously nigh, they were left to make their way to it at the sedate and solemn pace which men must adopt who have at once a sense of personal dignity and trousers from which the buttons have been removed. "Applied as a measure of humiliation or derision," says Professor Despagnet, "this treatment would have been odious; as a measure of defence, to prevent the prisoners rejoining their army as quickly as they might, it can be justified. The Boers could have detained the captured soldiers, and *qui peut le plus peut le moins*."⁵ Generally no ill resulted from the despoiling of the prisoners, who were able to reach a friendly column or town without delay. But the Boer practice was sheer barbarity and inhumanity when it involved (as it did at times) the abandoning of starving, unarmed, and practically

¹ *Times History*, Vol. IV, p. 507.

² De Wet, *Three Years' War*, p. 261.

³ *Times History*, Vol. IV, p. 445.

⁴ De Wet, *Three Years' War*, p. 288.

⁵ *La Guerre sud-africaine*, p. 303.

Inhumane
treatment
of prison-
ers in this
war.

naked men far from any white settlement or British force. The British commanders would have been amply warranted in resorting to reprisals against Boer leaders who authorised such acts. And certain of the Boer commandants were chargeable with worse inhumanity still. In December, 1901, one of the Free State commandants was put on his trial for sundry offences. Among the charges preferred against him were the following two:—

. . . . (9) A barbarous act contrary to the customs of war (placing prisoners in the firing line).

(10) A barbarous act contrary to the customs of war (driving prisoners on foot with mounted commando and starving them).

At the trial an Afrikaner scout employed by the British Intelligence Department, who had been taken prisoner by the commandant, testified that at the fighting at Zeegogal in March, 1901—

Only we prisoners and the guard were in the firing line. . . . As far as I could see the firing was always concentrated on us prisoners, and when we wanted to put up a flag the guard said, "if you do I shall shoot you." We were simply exposed like this to draw the fire. . . . We were driven at a fearful rate on foot without any food, and they were always cracking whips over us. We begged all our food from the farms, and while I was with the commando I never got any food from the commando.

Similar evidence was given by another witness who had been a prisoner with the commando on the same occasion. For these and other offences against the laws of war the death penalty was inflicted.¹ There is ample evidence that such inhumanity as this man was guilty of was the exception and not the rule; in the main, the Boers, leaders and men, treated their prisoners not only with kindness but with tactful courtesy. When the Gloucesters and the Irish Fusiliers were captured at Nicholson's Nek, the conduct of their captors was beyond reproach. "The sting of contumely," says Sir Arthur Conan Doyle, "or insult was not added to their misfortune . . . No term of triumph or reproach came from their [the Boers'] lips . . . Those who were within reach of human help received all that could be

¹ See *Papers relating to Martial Law in South Africa* (Cd. 981, 1902), pp. 271-2, 290.

given. Captain Rice of the Fusiliers was carried wounded down the hill on the back of one giant, and he has narrated how the man refused the gold piece which was offered him Then the victors gathered together and sang psalms, not jubilant, but sad and quavering.”¹

The British troops were not long in showing that they too could be chivalrous and considerate in the hour of triumph. After the Paardeberg surrender, “the troops,” says the German General Staff historian of the war, “followed the good example of the Commander-in-Chief, making a point of providing their half-starved prisoners with food and drink, each man sharing, in the most liberal manner, the little he had, while the Boers were also treated with every consideration in other respects.” The British officers and soldiers “behaved as perfect gentlemen towards the prisoners.”² The testimony of a responsible writer of this kind is more valuable than the catch-penny stories of British inhumanity which flooded the Press of Europe at the time of the war. One is surprised to find such a writer as M. Arthur Desjardins lending his authority to back the uninformed newspaper abuse, and ascribing the brutality of the British Army (which he presumes) to the fact that “a certain number of its soldiers, accustomed to fighting away from Europe, have not the least notion of the laws and customs of war obtaining among civilised nations.”³ The transportation of the Boer prisoners over-seas was the great rock of offence to the Continental writers.⁴ Yet such a precaution was amply justified by the troubled and disaffected state of South Africa at the time of the war, and is in no wise contrary to the letter or spirit of International Law. There is not one tittle of evidence that the prisoners were ill-treated in any way whatever in the camps of internment in Ceylon, St. Helena, or Bermuda. I shall give one instance to show the spirit in which they were received and the solicitude for their feelings displayed by the British authorities. A few days before the

Treat-
ment of
Boer
prisoners
by the
British.

¹ *Great Boer War*, p. 124.

² *German Official Account of the War in South Africa* (Colonel Waters' translation), pp. 210-11.

³ *Revue des Deux Mondes*, 28th March, 1900, p. 54.

⁴ See Despagnet, *op. cit.* p. 223.

Paardeberg prisoners arrived at St. Helena, Governor Sterndale issued a proclamation in which he said :

H.E. the Governor expresses the hope that the inhabitants will treat the prisoners with that courtesy and consideration which should be extended to all men who have fought bravely in what they considered the cause of their country, and will help in repressing any unseemly demonstration which individuals might exhibit.

The Boers were deeply touched by the courtesy and kindness of their reception.¹ One finds an echo here of the fine courtesy which Grant displayed when he stopped the salute of guns after Appomattox. "The Confederates," he says, "were now our prisoners and we did not want to exult over their downfall."² One thing is certain about the Boer prisoners: they themselves were content and more than content with the treatment they received. They sang a very different tune from their champions in the European Press; though doubtless, if the latter had heard (as I have) from the poor victims themselves, how they fared in confinement, they would still have vilified perfidious Albion for her treatment of her captives. There was a popular demand at the time for denunciation of England, the hotter the better, and the writers were too good journalists not to suit their output to the popular taste. With the question of the concentration camps, another stock subject for hysterical abuse, I shall deal a little later.

Treat-
ment of
Russian
prisoners
by the
Japanese.

In nothing was the splendid efficiency of the Japanese army administration more noticeable, in the Russian war, than in the arrangements made in connection with the prisoners of war. Regulations on the subject were issued by the War Minister immediately after the opening of hostilities (14th February,

¹ From an article *Exiles of St. Helena*, in *African Monthly*, October, 1907.

² Grant, *Memoirs*, p. 633. Gordon (*Reminiscences*, p. 443) speaks of the "marked consideration and courtesy" of the Federals at Appomattox. Generals Gibbon, Griffin and Merritt, who were appointed to discuss the details of the surrender with Generals Longstreet, Pendleton, and Gordon, seemed quite unable to remember any engagements in which the Federals had won; they "endeavoured rather to direct conversation to engagements in which the Union forces had been vanquished. Indeed, Confederate officers generally observed and commented upon this spirit, which at that time seemed to actuate the privates as well as the officers of the victorious army" (do., p. 452).

1904), and a little later an Imperial decree created a "Bureau for information relative to prisoners of war," in accordance with the Hague *Règlement*. Besides embodying the Hague rules, these regulations represent the very best and most complete expression of International usage and might well serve as a standard and guide for similar regulations in future wars. They are even better than the Russian rules of 1877, admirable though the latter are.¹ And the practice of the Japanese in regard to their prisoners was as irreproachable as their precept. In one respect only was there anything to find fault with, and in this one case the enormous difficulties of transport and the difference between Eastern and Western standards of comfort and modes of living were responsible for the hardships suffered by the Russian prisoners. Professor Ariga fully admits that the latter had reason for complaining of their treatment in Manchuria, and that in many cases they were badly fed, badly housed, and insufficiently clothed. But this, he argues, was absolutely unavoidable. Under the Japanese regulations the sum of ¥60 yen (1s. 2d.) *per diem* was devoted to subsisting each prisoner of officer's rank, and ¥30 yen (7d.) for each soldier—sums which are about twice as high as those provided for Japanese officers and soldiers respectively. When some Russian officers, taken prisoners at Mukden, complained to one of their captors of the lack of proper nourishment and clothing, the latter answered them in a very practical way. He showed the Russians the portion which had been allotted to him, the Japanese, for his meal, and which consisted of rice with some morsels of hashed meat and a salted plum. He also unbuttoned his tunic and showed that there was nothing underneath but flannel—which is the regulation. Whenever it was possible, as it was after the capture of Port Arthur and Mukden, the Russian prisoners were fed on their national black bread from the supplies taken as spoil of war.²

The most perfect organisation cannot entirely prevent a certain amount of harsh treatment being inflicted upon prisoners

¹ For the Japanese regulations, see Ariga, *op. cit.* pp. 93 ff.; for the Russian (1877), De Martens, *op. cit.* p. 479.

² Ariga, *op. cit.* pp. 111-13. Sir Ian Hamilton was told by the Russian prisoners going south that they felt hungry again half an hour after eating their ration of rice (*Staff Officer's Scrap Book*, Part I, p. 218).

Compare the sufferings of the prisoners in the Franco-German war.

when they are first captured. The French prisoners of 1870-1 had more reason for complaining than the Russian prisoners of 1904-5. One may read, in the War Correspondence of the time, of trainloads of prisoners arriving in Germany in the most terrible and pitiable plight: of men scantily clad, without greatcoats and boots, herded like animals in open trucks and exposed to a cold so bitter that it was no uncommon thing to find them frozen to the boards in their own filth and, in some cases at least, exhausted beyond recovery when the destination was reached.¹ Nor were the German prisoners in France without good grounds for complaint. Bismarck protested against the treatment of the prisoners confined at Orleans and with General Faidherbe's army. The former were "penned up in the gangways and cells of the prison at Pau. For a bed they had a bundle of straw, and for six days only bread and water was given them, until English and German ladies took pity on them, assisted them from their own means, and induced the reluctant authorities to take some care of them." Faidherbe's prisoners were "kept in lofts without fire, without blankets, without warm or sufficient food, in a cold of sixteen degrees."²

Russian prisoners in Japan had no grounds for complaint.

Once Japan was reached the ration allowances were found to be amply sufficient for the prisoners' wants, everything being very cheap in Japan. With a few exceptions, all the prisoners were perfectly satisfied with the food, clothing, etc., found for them at the depots of internment.³ Everything possible was done for their comfort and health. Some of the officers brought out their families from Russia to share their captivity; others whose families had been in Port Arthur and who had declined the privilege of returning to Russia on parole, were accompanied by their families when they proceeded to Japan as prisoners of war.⁴ Interpreters to the number of 182 were attached to the internment camps, for the convenience of the prisoners. It is a testimony to the happy lot of the interned Russians that some of them elected to take up their residence permanently

¹ See *The Times* correspondent's report in Cassell's *History*, Vol. II, p. 130.

² Cassell's *History*, Vol. I, p. 222.

³ Ariga, *op. cit.* p. 118.

⁴ A similar concession—the privilege of being accompanied by their families in captivity—is granted to prisoners of war by the French *Règlement* relating to the subject (Pillet, *op. cit.* p. 157).

in Japan when peace was declared.¹ But the most striking proof of the humanity of the captors is the generous tribute of the Russian jurist and statesman, the late Professor De Martens. Those who have read his "Peace and War" know how mercilessly he could criticise any failure to comply with the rules of International Law or usage, and they can appreciate at its proper value his acknowledgment, addressed in an official minute to the Japanese Government in November, 1906, of the "devoted care bestowed upon the Russian prisoners of war in Japan during the course of the war."²

"It was only to be expected," says Professor Ariga, "that in Russia, the country of Alexander II and Nicholas II, the Imperial authors of the Declaration of Brussels and the *Règlement* of the Hague, the Japanese prisoners would be properly treated. All the evidence shows that it was so, save in two cases."³ The two cases he refers to are the action of the Russian army in parading the Japanese prisoners in the streets of Mukden, which was to inflict upon them a moral indignity and to fail in the duty of humane treatment prescribed by Article IV; and the very inexact returns as to the number of Japanese prisoners in Russia which were made by the Russian Bureau of Information. Before the peace of Portsmouth, the numbers were returned as 46 officers and 921 soldiers; they proved ultimately to be 2,083 in all. Except for these two cases, there was nothing to complain of in the treatment of the Japanese prisoners; the regulations issued on the subject were "very fair," says Professor Ariga.⁴

The effects of prisoners of war remain their property, with the exception of the things especially mentioned in Article IV. The regulations for the treatment of prisoners of war issued by the 2nd Japanese army in 1904 contained the following provision:

Not only the spoliation, but even the simple transfer, by way of a gift, of articles of a non-warlike nature which the prisoners have been permitted to take with them or which have belonged to the enemy's dead, are strictly prohibited.⁵

The captor, may, however, find it advisable to take charge of

¹ Ariga, *op. cit.* p. 120.

² *Ibid.* p. 121.

³ *Ibid.* p. 124.

⁴ *Ibid.* p. 124.

⁵ *Ibid.* p. 111, note.

their effects temporarily. As General Voigts-Rhetz pointed out at Brussels in 1874—and his observation was recorded in the Protocol as an accepted “gloss” upon the text—“if a prisoner is the bearer of a large sum of money, it might be taken charge of for the time, because money facilitates escape; a receipt should be given to the prisoner and the money should be repaid to him later.”¹ The Russian Regulations of 1877, the German Official Manual and the Japanese Regulations of February, 1904, all provide for the property of prisoners being stored by the capturing State and returned to the owners on their liberation.² It is usual to allow an officer to retain his sword on capture, but he cannot claim to wear it during captivity.³

Prisoners of war must not be confined like criminals.

Prisoners of war are not criminals and must not be confined except as an indispensable measure of safety. If they commit offences against common law (burglary, for instance) they may be punished therefor by imprisonment, and infractions of disciplinary regulations would also make them liable to penal confinement. Apart from such cases, confinement would only be justified where it is “deemed necessary on account of safety.”⁴ In October, 1870, the German authorities had to remove five hundred Turco and Zouave prisoners from Wahn Heath near Cologne, to the citadel at Wesel, as the result of the discovery of a plot among the prisoners to effect their escape from the place of internment.⁵ During the Anglo-Boer War, Lord Roberts and the President of the S.A. Republic exchanged correspondence on the subject of the confinement of prisoners of war. The former addressed a letter to the President saying that he had learnt that Colonial troops who were captured by the Boers were treated as criminals and imprisoned in the Pretoria prison. The President denied the fact, but admitted that a small number of prisoners who had

Correspondence on this subject between British and Boer authorities in 1900.

¹ Brussels B.B. p. 213.

² De Martens, *op. cit.* p. 480; *Kriegsbrauch im Landkriege*, p. 14; Ariga, *op. cit.* p. 96.

³ Article 73 of the *American Instructions*; Article 10 of the *Japanese Regulations* of February, 1904, Ariga, *op. cit.* p. 94. See also *supra* pp. 255-256.

⁴ *American Instructions*, Article 75.

⁵ Cassell's *History*, Vol. I, p. 423.

committed some offence against the laws of war and were awaiting trial, or who had either actually attempted or were suspected of the intention of attempting to escape, had been confined in the common prison as a measure of safety, but apart from the ordinary criminals. Lord Roberts expressed satisfaction with this explanation, but pointed out that the British authorities made no difference of treatment in the case of such prisoners as were suspected of wishing to escape, and that exceptions of this kind opened the door to abuses on the part of subordinates without the knowledge of the authorities.¹ It is usual to allow a fairly wide liberty of movement to prisoners who give their parole not to attempt to escape.² Officers are generally given greater privileges in this respect than prisoners of inferior rank. The Turkish officers interned in Russia in 1877-8 and the Russian officers in Japan during the late war were allowed to lodge with private families in the villages near the internment *dépôts*.³

"Work is an element of health and morality,"⁴ and prisoners of war may be *compelled* to work by the capturing belligerent.⁵ The exemption of officers is an amendment proposed by the Spanish delegate and adopted by the Conference at the Hague in 1907. It represents Japanese practice in the war with Russia; the Russian officers were not forced to work, as the prisoners of lower rank were.⁶ The work must be suitable

Prisoners not of commissioned rank may be forced to work.

¹ Despagnet, *op. cit.* pp. 221-2.

² Ariga, *op. cit.* p. 119.

³ De Martens, *op. cit.* p. 479; Ariga, *op. cit.* p. 119.

⁴ Pillet, *op. cit.* p. 155.

⁵ Brussels B.B. p. 289.

⁶ Ariga, *op. cit.* p. 114. The chief reason for the exemption is that it is derogatory to the dignity of commissioned officers to have to work beside their men, even in captivity, and that it would tend to undermine discipline for the future. But one may surmise that the fact that efficiency as day-labourers would vary inversely with army rank in the case of a composite band of prisoners may have been an unexpressed but nevertheless potent argument for the exemption. After the break-up of Lee's army in 1865, the officers and men were sometimes employed, as a measure of charity, by the Confederate farmers, and Gordon (*Reminiscences*, p. 453) relates an amusing story which bears out the truth of what I say:—

Since the war some of these privates have told with great relish of the old farmer near Appomattox who decided to give employment, after the surrender, to any of Lee's veterans who might wish to work a few days for food and small wages. He divided the Confederate employes into squads according to the respective ranks held by them in the army. He was

to the prisoners' rank and abilities and must have nothing to do with the military operations (. . . *n'auront aucun rapport avec les opérations de la guerre*). The provision as to this last point is somewhat vague. The Brussels project forbade work having "*an immediate connection (un rapport direct)*" with the operations in the theatre of war," and the terms of the Oxford Manual (Article 71) are the same as the Brussels terms. Under the latter provision, a belligerent would certainly be entitled to employ prisoners on military works at a distance from the scene of war; this was admitted by the President¹ and one delegate pointed out that such a provision, worded as it was, was on that account undesirable and suggested modifying it.² What, exactly, the Hague Article forbids is somewhat doubtful. Professor Holland says that "work, even upon fortifications, at a distance from the scene of hostilities, would not seem to be prohibited by this paragraph,"³ and Bluntschli held that the unwritten law of war authorised the employment of prisoners in constructing fortifications, "while the struggle is still distant."⁴ In the Crimean War, the Russian prisoners were employed in building the British military railway at Balaclava.⁵ The best modern opinion is adverse to permitting any military work whatever being exacted from prisoners. Geffcken states that "if such work is not an immediate and direct participation in the hostilities, it at least amounts to increasing the military force of the capturing State and the

No military work should be demanded.

uneducated, but entirely loyal to the Southern cause. A neighbour inquired of him as to the different squads :

"Who are those men working over there?"

"Them is privates, sir, of Lee's army."

"Well, how do they work?"

"Very fine, sir; first-rate workers,"

"Who are those in the second group?"

"Them is lieutenants and captains, and they works fairly well, but not as good workers as the privates."

"I see you have a third squad: who are they?"

"Them is colonels."

"Well, what about the colonels? How do they work?"

"Now, neighbour, you'll never hear me say one word ag'in any man who fit in the Southern army; but I ain't a-gwine to hire no generals."

¹ Brussels B.B. p. 213.

² Brussels B.B. p. 289.

³ Note to Article 8, p. 11 of British Official *Laws and Customs of War*.

⁴ Bluntschli, *op. cit.* sec. 608, *note*.

⁵ Russell, *Crimea*, p. 357.

prisoners ought not to be forced to assist in it.”¹ Professor Pillet would admit no military work of any kind except perhaps such military sanitary services as are connected with hospitals and ambulances and are therefore more or less of a neutral character.²

The remuneration of prisoners of war for work done for the State is to be on the scale fixed for “working pay” in the capturing army. The British rates of working pay vary from 8*d.* a day (of 8 hours) for general labourers’ work, *e.g.*, as navvies, or on the construction of drill-grounds or rifle-ranges, to 1*s.* 4*d.* a day for skilled artificers. The Japanese paid the Russian non-commissioned officers and men who were employed on public works in Manchuria the equivalent of 2*d.* and 1*d.* a day respectively.³ The French prisoners in Germany received about 1½*d.* for a five-hours’ day’s work in 1870–1. The last named were employed in harvesting, in merchants’ offices, in workshops, and other industrial occupations. Although as many as possible were given the opportunity to work, enough employment could not be found for the immense numbers interned in Germany; in Ulm, in Stuttgart, and in other German towns, they could be seen lounging listlessly through the streets, eating their hearts out, “dreaming of past glories or anxiously looking forward to the time when they would be restored to liberty and to France.”⁴ It is no real humanity to allow prisoners to spend their lives in the dull monotony of idleness, and the provision of the sixth Article of the *Règlement* is a laudable one. But I suggest that it holds the seeds of a large crop of trouble in some future war. If any considerable number of prisoners are interned in a country in which labour is powerfully organised and represented, exception is bound to be taken by the Trade Unions to the employment of cheap alien labour as represented by the prisoners of war. One can imagine the outcry which would arise in, say, England or Germany if a large number of prisoners were employed on State or Municipal works at a time when trade was dislocated and

Payment
of prison-
ers for
their
labours.

Article
VI. of the
Règlement
may cause
Labour
troubles.

¹ Quoted, Bonfils, *op. cit.* sec. 1127. See Hall, *International Law*, p. 407.

² Pillet, *op. cit.* p. 155.

³ Ariga, *op. cit.* p. 114.

⁴ Cassell's *History*, Vol. I, p. 423; *Kriegsbrauch im Landkriege*, p. 14, note.

stagnant, as it would be during a war, and many citizens out of work.

Cost of maintenance of prisoners may be deducted from their earnings.

"It is not customary in the British Army," says Professor Holland, with reference to the last sentence of Article VI, "to charge the cost of the maintenance of prisoners of war against their earnings, but reciprocity of treatment is expected from the other belligerent."¹ "In France," says the French *Manuel* (p. 75), "no deduction is made for the benefit of the State from the amount of the salary earned by a prisoner (Art. 91 and following of the Regulations of 21st March, 1893)." Against deducting the cost of maintenance from earnings is the consideration that prisoners are to be treated like the soldiers of the interning State and no such deduction would be made from the latter's working-pay. On the other hand, as the cost of maintaining the prisoners usually falls in the end upon their own Government, and as, though in captivity, they are still the servants of that Government, it is fair that their services as workmen, which are a poor substitute for their services as soldiers, should go to relieve the cost of the war to their country as far as possible. In 1877-8, the Russian Government appropriated part of the earnings of the Turkish prisoners to meet the cost of keeping them, handing over the surplus to the men.² I can find no mention of any deduction being made in the Franco-German or Russo-Japanese war; probably none was made; it would have been almost heartless to charge men for their board and lodging out of wages of 1*d.* or 2*d.* a day. At the last Hague Conference, Spain proposed that no deduction for cost of maintenance should be made from the earnings of prisoners of war. The proposal was defeated by 23 votes to 2.³

The capturing belligerent is bound to maintain the prisoners of war, but he may arrange with the other belligerent that the latter shall bear the final charge for the expenses of maintenance, either as an item in the general war indemnity or as a special repayment. Japan and Russia made such an arrange-

¹ *Official Laws and Customs of War*, p. 12.

² De Martens, *op. cit.* p. 480.

³ See *The Times* of 15th July, 1907.

ment in 1905. Article 13 of the Treaty of Peace provided that:—

The Governments of Japan and Russia shall present to each other, as soon as possible after the delivery of prisoners has been effected, a statement of the direct expenditure respectively incurred by them for the care and maintenance of prisoners from date of capture or surrender up to the time of death or delivery. Russia engages to repay to Japan, as soon as possible after the exchange of the statements as above provided, the difference between the actual amount so expended by Japan and the actual amount similarly disbursed by Russia.¹

When the accounts were balanced, it was found that Russia owed Japan a sum of nearly five millions sterling and this was paid over to the latter in November 1907.²

Prisoners are to be treated, as regards food, quarters and clothing, on the same footing as the troops of the capturing army. It may therefore happen that they fare better in captivity than in their own country and still better than their comrades who are still campaigning. Several of the delegates at Brussels wished to provide specifically that their position should not be better than that of troops serving in the war, as otherwise a premium is set upon desertion and misbehaviour.³ It was not, however, found possible to make the text cover such a point without sacrificing the requirement as to humane treatment. There is little doubt that so far as material comfort goes prisoners of war are far better off, under modern conditions and speaking generally, than fighting troops. Compare the position of the Turkish troops who were interned in Russia in 1877–8 and their comrades who fought through the bitter winter in the snows of the Balkans. The former were subject to the liberal Russian regulations as to food, etc., and if they got no pay, they were still infinitely more favourably situated than the serving troops, who were wretchedly fed and whose pay had a knack of being absorbed in the long and thirsty official channel which led from Constantinople.

Prisoners of war are subject to the laws and regulations of

¹ Kinkodo Company's *History*, p. 1410; Ariga, *op. cit.* p. 566.

² *The Times*, 25th November, 1907.

³ Brussels B.B. pp. 168, 214.

Prisoners
are sub-
ject to
captor's
army
regula-
tions.

the capturing army. The French prisoners of 1870-1 were placed under precisely the same regulations as the soldiers who guarded them, except that they got no pay unless they worked. The discipline of the German army was applied to them. "Obedience and military honours were required from the prisoners, and any insubordination or want of respect, even among themselves, was punished by arrest. A soldier was shot at Ingolstadt for striking a Bavarian lieutenant, and, although it was pleaded that he was drunk at the time the offence was committed, the sentence was rigorously carried out."¹ "Prisoners of war," says the German Official Manual, "are subject to the laws and regulations of the country and the place in which they are confined and more especially to the dispositions governing the national troops of that country. They must be treated like the soldiers of the capturing State, no better, and no worse."² And, again—"Officers who are prisoners are never the superiors of the soldiers of the capturing State but become the subordinates of those responsible for guarding them."³ The Russian military laws were applied to the Turkish prisoners in 1877-8, except that new dispositions were made as to punishment for disciplinary offences, to take the place of the usual forfeitures of pay or rank, which would be inapplicable to prisoners.⁴ Article 4 of the Japanese Regulations of February, 1904, subjected the Russian prisoners to "the discipline in force in the Imperial army,"⁵ and Article 25 provided for some one prisoner being told off to be responsible for the discipline of each "barrack room" and to voice the demands and complaints of his fellows.⁶ A special Imperial Decree of February, 1905, provided that the prisoners should be tried by a Council of War for infractions of law and order, in the same way as Japanese troops, and authorised special punishments for breach of parole, conspiracy, etc.⁷

Prisoners
may be
shot while
escaping ;

Though the *Règlement* does not state so expressly, it is understood that a prisoner may be prevented by violence, and by violence which may result in his death, if no less vigorous

¹ Cassell's *History*, Vol. I, p. 423.

² *Kriegsbrauch im Landkriege*, p. 15.

³ *Kriegsbrauch im Landkriege*, p. 13.

⁴ De Martens, *op. cit.* p. 479.

⁶ *Ibid.* p. 96.

⁵ Ariga, *op. cit.* p. 94.

⁷ *Ibid.* p. 101.

measures will suffice, from effecting his escape. The Brussels Project provided that "arms may be used, after summoning, against a prisoner attempting to escape," and the Protocol records the views of the Conference that he might be fired upon after *one* summons.¹ This provision was suppressed by the first Hague Conference, not because it is improper to fire upon an escaping prisoner, but because it was deemed inexpedient to approve this extreme measure in the *Règlement*.² As to whether a prisoner who has been retaken while attempting to escape may be punished therefor, there has been some difference of opinion among jurists. The *American Instructions* (Art. 77), while permitting the killing of a prisoner in flight, prescribe that "neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt to escape." Bluntschli's view is the same as Lieber's.³ It may be a prisoner's duty to try to escape. The British Army Act (section 5 (3)) punishes with penal servitude any officer or soldier who "having been taken prisoner, fails to rejoin H.M.'s service when able to rejoin the same." But if it is no crime to attempt to escape, it is an infraction of the disciplinary regulations of the capturing army, and for this, as for any other infraction, disciplinary punishment may be inflicted: not because the act punished is *malum in se*, but because it is *malum prohibitum*, to use a useful legal distinction. The Brussels Code, adopting this view, subjected a prisoner retaken in flight to "disciplinary punishment or a stricter surveillance," and the Hague *Règlement*, going further on the same lines, makes him liable to "disciplinary punishment" and omits the alternative mentioned in the Brussels Project. The point gave rise to a lengthy discussion at the Hague. "Finally," says the Report, "it was agreed, as it had been in 1874 at Brussels, that an attempt to escape should not go entirely unpunished, but that it is desirable to limit the degree of punishment which it may entail—especially, to prevent its being assimilated to desertion in face of the enemy and, as such, punished with death. . . . At the same time, it was agreed in

but only
subjected
to discip-
linary
punish-
ment if
retaken
in the
attempt.

¹ Brussels B.B., pp. 169, 289.

² Hague I B.B., p. 144.

³ Bluntschli, *op. cit.* sec. 609.

the course of the discussion that this restriction does not apply to cases in which the escape is accompanied by special circumstances amounting, *e.g.*, to a conspiracy, rebellion or mutiny. In such cases, as General Voigts-Rhetz observed at Brussels in 1874, the prisoners are punishable under the first part of the same Article, which says that they are 'subject to the laws, regulations and orders in force in the army of the State in whose power they are,' and this provision is supplemented by that of the same Article VIII which lays down that 'any act of insubordination justifies the adoption towards them of such measures of severity as may be necessary.'"¹ War law, therefore, while allowing the killing of a prisoner to prevent his escaping, does not allow it as a punishment except where there has been a conspiracy or plot. Anything in the nature of concerted rebellion may be severely punished—even with death;² but as regards ordinary attempts to escape on the part of prisoners who have not given their parole, these, as the German Manual points out, "must be considered as manifestations of a natural desire from freedom, not as crimes. They must therefore be repressed by a restriction of the liberty allowed and by a stricter detention, but not punished by death, which could only be inflicted in the case of formal plots, by reason of their dangerous character."³ Articles 7 and 8 of the Japanese Regulations of February, 1904, made prisoners re-captured while escaping liable to the summary punishments in force in the Japanese army, but specially exempted them from any "condemnation for a crime or delinquency by reason of their attempt to escape."⁴ If, however, a prisoner attempted to escape after giving his word of honour not to do so, he was liable to a "major detention" (five years' imprisonment).⁵ A breach of parole of this kind is usually treated in the same way as a breach of parole after release on conditions (as to which presently) and entails, in theory at least, the liability to capital punishment. "In case of violation of parole," says the German Manual,

¹ Hague I B.B. pp. 143-4.

² See Article 77, *American Instructions*, and the Japanese Imperial Decree relating to the punishment of prisoners of war, Ariga, *op. cit.* p. 151.

³ *Kriegsbrauch im Landkriege*, p. 14.

⁴ Ariga, *op. cit.* p. 94.

⁵ *Ibid.* p. 101.

referring to prisoners who have promised not to escape, "the death penalty is, in principle, justified."¹

In the war of 1870-1, a point of much interest arose in connection with the escape of prisoners of war. The evasions of the French officers interned in Germany became so frequent that General Vogel von Falkenstein issued a Decree that each time an officer escaped, ten of his comrades, chosen by lot, should be confined in a fortress, deprived of their privileges as prisoners of war, and subjected to a strict surveillance until the escaped officer was recovered. The German General Staff jurist justifies the Decree as a measure of reprisals.² But, as Pillet observes, "reprisals are not permissible when there has been no offence against International Law,"³ and it is no offence against International Law for a prisoner to escape. Bonfils points out that "it is contrary to the most elementary notions of justice to try to create a solidarity among prisoners of war, and on account of the escape of one, to aggravate the situation of the rest."⁴

If success crowns an attempt to escape, it has the same "whitewashing" effect as it has in the case of the spy or the revolutionary; it purges the offence and no penalty can be inflicted if the prisoner again falls into the hands of the enemy.

A prisoner is bound to declare his proper name and rank. No mention is made of disciplinary punishment being inflicted if he declines to do so, and presumably the effect of Article IX is to put officers and non-commissioned officers who refuse to state their names and rank on the same footing as privates. Prisoners cannot, however, forfeit any of the privileges of their rank for refusing to give information on other subjects; still less may they be tortured in order to extract information from them, as was once the practice. Prisoners often constitute a valuable source of information of which an enemy would be quixotic to fail to take advantage. There is nothing to forbid his rewarding an obligingly garrulous prisoner, but he must not

The Decree of General Vogel von Falkenstein in 1870.

No punishment for successful attempt to escape.

Prisoners are bound to declare their names and ranks;

they cannot lose their privileges for refusing other information

¹ *Kriegsbrauch im Landkriege*, p. 14.

² *Ibid.* p. 14.

³ Pillet, *op. cit.* p. 156.

⁴ Bonfils, *op. cit.* sec. 1130.

penalise one who refuses to state anything more than what this Article requires. "This Article," says Professor Ariga,

determines the subjects on which prisoners must reply and the punishment to be inflicted if they disobey, but it does not imply that these are the only subjects on which the enemy may question them. The army which has captured a prisoner may quite properly employ all means, provided they are humane, to obtain from him as much information as possible regarding the enemy's movements. That is what we did, as may be seen from the voluminous depositions of prisoners preserved in the archives of each army corps operating in Manchuria. We do not think that it will ever be possible to limit the liberty of action of an army in the field, by limiting the right to question prisoners of war.¹

*The parole
d'honneur.*

A parole is a voluntary contract made between the captor and his prisoner, by which the latter obtains his freedom under certain conditions—usually on condition of not serving against his captor during the existing war.

The army regulations of some countries place restrictions on the powers of officers as regards the giving of their parole. French officers are now forbidden (by a Decree of 1891) to separate themselves from their men, whom they must consequently accompany into captivity;² and Russian officers cannot give their parole save with the sanction of the Czar. In 1905, the officers of the Port Arthur garrison were permitted by General Baron Nogi to telegraph to the Czar asking for his authority to their returning to Russia on parole; the authority was given and over 500 officers availed themselves of it.³ In Austria, officers and men are forbidden to give their parole.⁴ In the British army, only commissioned officers are allowed to give their parole for themselves and their men.⁵ The American Instructions also allow only officers to give their parole, "and they can give it only with the permission of their

¹ Ariga, *op. cit.* pp. 105-6.

² Bonfils, *op. cit.* sec. 1267.

³ Kinkodo Company's *History*, p. 1110; Ariga, *op. cit.* p. 322. General Stoessel's telegram to the Czar requested permission for the officers to undertake "not to take part in the present war," and the Czar gave permission in these terms. But, as I explain in the text, the obligation actually accepted by the officers was much more comprehensive than this. No difficulty appears, however, to have arisen.

⁴ Bonfils, *op. cit.* sec. 1267.

⁵ British Official *Laws and Customs of War*, p. 14.

superior, so long as a superior in rank is within reach.”¹ The form of the parole varies. That used in the American Civil War bound those who signed it “not to serve the armies of the Confederate States, or in any military capacity whatever against the U.S.A. or render aid to the enemies of the latter, until properly exchanged in such a manner as shall be mutually approved by the relative authorities.”² The Hanoverians and Saxons who were paroled in the Seven Weeks’ War undertook not to serve against Prussia during the war.³ A more comprehensive undertaking was required of the French officers in 1870–1. They had to “give their word of honour in writing not to serve against Germany during the present war, nor to act against its interests in any other way.”⁴ The terms were so worded in order to prevent the paroled officers being employed in army offices or for the drilling of recruits or the organisation of colonial defence, etc.⁵ They have been condemned by Professor Pillet as “incompatible with the duty of the officers,”⁶ but as the same jurist adopts (as does Bonfils too) the view of Lentner that *every* parole implies the obligation not to assume any function which has any connection whatever with military operations,⁷ his objection does not seem a very weighty one. There would appear to be nothing objectionable but rather an advantage in turning an admittedly implied obligation into an express one and thus removing the possibility of misunderstandings. As paroling is the alternative to keeping in confinement, and as it is a privilege granted by the captor at his discretion, he may reasonably demand that it shall confer freedom and no more; otherwise by allowing officers to return on parole, he would act in his enemy’s interests, for the employment of the released officers on military duties away from the seat of war would probably set other officers free for service at the front. It is noteworthy that the Japanese adopted the wider form of parole in their

Form of
parole
adopted in
1870–1;

and in
1904–5.

¹ *American Instructions*, Art. 126.

² Fitzhugh Lee, *General Lee*, p. 398.

³ Hozier, *Seven Weeks’ War*, pp. 281, 353.

⁴ *German Official History*, Part II, Vol. I, Appendix 78.

⁵ See Ariga, *op. cit.* p. 115.

⁶ Pillet, *op. cit.* p. 362.

⁷ *Ibid.* p. 161; Bonfils, *op. cit.* sec. 1135.

war with Russia. In the war with China, they required the Chinese officers paroled at Wei-hai-wei to undertake "that they will not re-engage themselves in the present war between Japan and Russia."¹ The Russian officers released at Port Arthur in 1905, however, had to pledge themselves "on honour and by writing not to take up arms again against Japan and not to act in any way in opposition to her interests up to the end of the present war."² Where a formula of this kind is not employed, it may presumably be understood that the parole does not forbid such military duty as is not in immediate connection with the campaign. The few British officers who were paroled by the Boers, verbally and in vague terms, during the South African War, were not sent into the field again but were employed on technical or administrative duties at coast ports or at home. The French *Manuel* (p. 78) states that the promise not to serve again during the campaign "extends to active service against the belligerent and his allies during the same war, but not to internal service; prisoners liberated on such a parole may therefore be employed in their country in instructing recruits in *depôts*, in working on fortifications of places not besieged, in maintaining public order, in fighting against other enemies, in fulfilling civil functions or diplomatic missions." It is not quite clear how the simple promise not to bear arms would be interpreted by Germany, for the General Staff Manual (p. 17) recommends that very precise conditions should be drawn up in the parole paper on this point and that it should be specifically stated whether the person released is bound only not to take up arms against the belligerent paroling him or whether he may serve his State in other spheres or in the colonies.

Paroling
of rank
and file.

Generally only officers or civil officials of corresponding status are released on parole; but sometimes in special circumstances, the rank and file are allowed the privilege as well. When Stonewall Jackson captured Harper's Ferry in September, 1862, he paroled the whole Union force at once, with the result that A. P. Hill's "light division" was able to reach the

¹ Sakuye Takahashi, *Cases on International Law during the Chino-Japanese War* (Cambridge University Press, 1899), p. 129.

² Ariga, *op. cit.* p. 311.

Antietam, by forced marches, in time for the great fight, and—chiefly because McClellan had put his cavalry in the centre of his line, not on the flanks—to carry the very present help of the bayonets of five brigades to Lee's hard-pressed battalions just when the Federals seemed on the point of crushing them.¹ Pemberton's army was paroled *en bloc* when it capitulated at Vicksburg. "Had I insisted upon an unconditional surrender," says Grant, "there would have been over 30,000 men to transport to Cairo, very much to the inconvenience of the army of the Mississippi."² This was in July, 1863, before Grant had put a stop to the exchanging of prisoners, and the men who were released usually returned to the ranks as soon as an equivalent number of the enemy's prisoners had been restored. Both Lee's and J. E. Johnston's armies were paroled wholesale, in 1865; the war was over when these two great leaders gave up their swords and Grant could afford to let the beaten Confederates return to their homes.³ In European wars, too, there are instances of the paroling of the rank and file of the army which has capitulated. When the Hanoverians capitulated after the battle of Langensalza (29th June, 1866), the soldiers were dismissed to their homes, and a similar course was taken a little later with all the Saxon prisoners who had been captured since the beginning of the war.⁴ Political motives were responsible for Prussia's generosity in these two cases. No similar privilege was allowed to the French soldiers of the line in 1870-1. Both Wimpffen at Sedan and Changarnier at Metz pressed for the privilege of returning home on parole being extended to the non-commissioned ranks, but the Germans declined to let others than officers and officials of similar standing go free. But the National Guards and Mobile Guards were usually dismissed on the stipulation that they were not to take up arms again—at Strassburg, apparently even without giving such a promise.⁵ Such troops

¹ Ropes, *The Story of the Civil War*, Part II, Chapter 3.

² Grant, *Memoirs*, p. 330.

³ *Ibid.* pp. 331, 631; Draper, *op. cit.* Vol. III, p. 611.

⁴ Hozier, *Seven Weeks' War*, pp. 281, 353.

⁵ "The National Guards and Francs-tireurs are relieved from making any declaration."—Article 3 of Act of Capitulation at Strassburg, German Official History, Part II, Vol. I, App. 49. But see *do.*, Part II, Vol. I, p. 142, as to

were not regarded as soldiers proper by the Germans, and it was the latter's policy to avoid doing anything which would have assimilated them to the troops of the line—as, for example, by taking them prisoners of war. In the war of 1877–8, the Turkish troops were frequently paroled; some thousands were sent home after Muktar Pasha's defeat at Avliar, and Gourko released the prisoners he captured at Telisch, on their engaging to take no further part in the war.¹ The paroling of the rank and file of the enemy's forces was tried at first on a large scale in the Anglo-Boer War of 1899–1902. Proclamations were issued by Lord Roberts in March and May, 1900, in which the burghers of the Free State and the Transvaal were promised passes to allow them to return to their homes, instead of being made prisoners of war, on condition of their taking an oath to abstain from further participation in the war.² The Boers took the oath readily, but did not hesitate to break it when they could do so with safety, and De Wet and other commandants when they needed recruits had no compunction about bringing moral pressure at any rate to bear upon men who were quite disposed to regard the oath they had taken voluntarily as having been taken under duress.³ They found it easy to quibble away their obligation when the British columns were out of reach and an *advocatus diaboli*, in the shape of an urgent commandant with sjambok and rifle, was unmistakably and unpleasantly present. It is unlikely that the experiment which the British tried and abandoned will be given another trial. In the negotiations for the capitulation of Port Arthur in 1905, Colonel Reiss, the Russian plenipotentiary, asked that not only the officers and function-

the Capitulation of Soissons where some thousand Gardes Mobiles were dismissed to their homes on the stipulation that they should not serve against Germany during the war; and also Cassell's *History*, Vol. I, p. 496, as to the capitulation of Thionville, where the Mobiles were dismissed with a warning that their lives and property would be forfeited if they were again found in arms.

¹ De Martens, *La Paix et La Guerre*, p. 481; Greene, *The Russian Army and its Campaigns in Turkey*, p. 416.

² *Proclamations of Lord Roberts* (Cd. 426, 1900), pp. 3, 7.

³ De Wet, *Three Years' War*, p. 200. Personally I know one Boer who twice took the oath and was twice brought under arms; finally he was made a prisoner of war.

aries but all the garrison might be liberated on parole. Major General Iditti, Nogi's Chief of Staff and his representative for the purpose of arranging the terms of surrender, replied—

We cannot allow the whole garrison to be set free, but, amongst the troops, the volunteers also may be liberated on parole.

Each paroled officer was specially permitted to take an orderly with him and the same privilege was extended to the officers' families, so that, in all, about 862 private soldiers were actually set free, but beyond this there was no paroling of the rank and file.¹

If a prisoner is allowed by the laws of his country to give his parole and is released accordingly, his Government is bound to recognise the validity of the contract. But what if the laws forbid paroling or make no mention of it, either to forbid or permit? "Authors generally admit that the officer or soldier is exposed to the penalty which the law attaches to his offence, but that his Government must nevertheless respect the parole that he has given."² Professor Pillet goes on to suggest a different solution of the problem; in such a case, he says, "the contract made without the adhesion of the Government cannot produce any binding effect upon the latter, and the released prisoner must choose between being treated as refractory at home, if he refuses to take up arms again, or, if he complies, of being treated by the enemy like any man who breaks his parole. The rigour of this decision would be modified if one could admit the solution proposed by Calvo, who thinks that in such circumstances the released prisoner should give himself up again and if he is sent back by the enemy, that he should be regarded as free from any obligation whatsoever." Professor Pillet's views have the support of the *American Instructions*, Article 131 ("If the Government does not approve of the parole, the paroled officer must return into captivity, and should the enemy

Position
of paroled
prisoners
whose
Govern-
ment does
not allow
paroling.

¹ Ariga, *op. cit.* pp. 308, 309, 325; Kinkodo Company's *History*, p. 1110. Professor Ariga says (p. 321) that the reason for allowing the orderlies to accompany the officers was that, in the Russian army, such attendants "constituted a mark of distinction, a rule of military honour," and Article XXXV of the *Règlement* requires the observance of the rules of military honour in fixing the terms of a capitulation.

² Pillet, *op. cit.* p. 160.

refuse to receive him, he is free of his parole”), and of Bluntschli,¹ and they are in harmony with Article X of the *Règlement*. That Article states that “prisoners of war may be set at liberty on parole *if the laws of their country allow*,” and in such circumstances—and presumably *only* in such circumstances—the Government of the released prisoners must recognise the parole. The releasing belligerent is bound to satisfy himself that his prisoners are not acting *ultra vires* in giving their parole; if he does not do so, he must be prepared to have them returned to him by their own Government for internment as prisoners of war. But as regards the released prisoner himself, “whatever are the circumstances, he who has given his parole is bound to keep it. He disqualifies himself if he fails to do so and is punishable if he is captured, even if his own Government has prevented his fulfilling his obligation.”²

The punishment of breach of parole.

The question of punishment for breach of parole is ably discussed by Professor Takahashi, of the Imperial Naval Staff College of Japan, in his work on the Chino-Japanese war.³ He examines the case of one George Cameron, an American in the service of China, who was captured by the Japanese and released on taking an oath not to serve the Chinese Government during the war. He broke his parole and was recaptured at the surrender of Admiral Ting’s fleet. “Some of the naval officers insisted on putting him to death, quoting many instances in European countries.” One such case was that of Colonel Hayne, an officer who was hanged in S. Carolina during the American Revolutionary War for breaking his parole. Colonel Hayne’s case was discussed in the House of Lords in February, 1782. On the one side it was affirmed that hanging was the usual and proper punishment for a parole breaker, and that Earl Cornwallis had followed such a procedure during his command in America. On the other hand, the Earl of Shelburne asserted of his personal knowledge that “the practice in the

¹ Bluntschli, *op. cit.* sec. 626—“When the Government of the paroled officer refuses to ratify his promises, the latter is bound to constitute himself a prisoner anew. If the enemy refuses to receive him as a prisoner of war, he is free, absolutely and unconditionally.” See Bonfils, *op. cit.* sec. 1137.

² *Kriegsbrauch im Landkriege*, pp. 17-18.

³ Takahashi, *Cases on International Law during the Chino-Japanese War*, pp. 136-142.

last war had been totally different. A greater degree of ignominy, perhaps a stricter confinement, was the consequence of such an action as breach of parole; the persons guilty of it were shunned by gentlemen, but it had never before entered into the mind of a commander to hang them." Cameron was not executed; he was sent back to Japan and imprisoned until the end of the war, when he was released. Takahashi states that the proper course (which was that adopted) was to deprive him of his privileges as a prisoner of war and place him in strict confinement; but it would also have been quite legal to have had him shot on the spot. If he means without any form of trial, then his view cannot be upheld. The correct procedure under the usages of war appears to be that indicated by Article 78 of the *Oxford Manual*, which lays down that

A prisoner liberated on parole and recaptured in arms, forfeits his rights as a prisoner of war, unless, subsequently to his liberation, he has been included in an unconditional exchange of prisoners.

This, the milder view, is now officially sanctioned by Article XII of the *Règlement*, which adds, however, that he may be brought before the courts. It will then be for the courts—which are not Courts-Martial but military courts established under martial law¹—to decide whether his breach of parole is of such a nature as to justify his being condemned to death. The military codes of most countries make a prisoner who has been paroled and who is recaptured in arms liable, in principle at least, to capital punishment. It is so in France,² in Germany,³ in America,⁴ in Japan,⁵ in Great Britain; the last named Power published an Army Order to the Army in South Africa, on 13th December, 1900, in which it was laid down that:—

The custom of war does not permit, in the present day, the execution of prisoners who are recaptured while attempting to escape, but such persons may be shot or otherwise put to death in the act of escaping; nor is breach of parole, which is liable to the punishment of death, usually so punished except in aggravated cases.⁶

¹ British official *Laws and Customs of War*, p. 14.

² Article 204, paragraph 2, Code of Military Justice.

³ *Kriegsbrauch im Landkriege*, p. 17.

⁴ *American Instructions*, Article 124.

⁵ *Règlement* of 28th February 1904, Ariga, *op. cit.*, p. 101.

⁶ Given in *Papers Relating to Martial Law* (Cd. 981), p. 16.

An aggravated case of the kind is that of the Boer officer referred to in Chapter III, who broke his parole and plotted to kidnap Lord Roberts;¹ and other cases in which the death penalty was inflicted in South Africa may be seen in the British Blue Book relating to Martial Law. They are all cases in which some further offence was superadded to the breaking of parole—as, *e.g.*, in the case of a burgher who was condemned and shot for the following offences:—

1. Attempted assassination.
2. Breaking the oath of neutrality.
3. Being in possession of arms.²

For breach of parole, pure and simple, the punishment usually inflicted in the Boer War was two years' imprisonment with hard labour.³ The German regulations appear to make a released prisoner who has violated his parole in some other fashion than bearing arms liable to a "military punishment," not to death; and the Japanese regulations expressly prescribe imprisonment, instead of capital punishment, in such a case.⁴ No case of breach of parole occurred during the Russo-Japanese War.⁵

The parole must be given and accepted freely and understandingly.

The giving and acceptance of parole being facultative on both sides, it is essential to the validity of the contract that the released prisoners should be consenting parties thereto. "Every release of a prisoner on parole must be free, whether it is a question of an officer or of a soldier; thus a State has not the right, in order to free itself of its prisoners, to send them back on condition of not serving again, if they have not agreed to this condition, and this agreement must emanate from the interested parties themselves."⁶ "No dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value."⁷ Everything connected with paroling must be done carefully, cautiously, and in proper form; it must be perfectly clear to the prisoners what they are undertaking, and there must be no misunderstanding on either side as to the nature and consequences of the undertaking

¹ *Vide supra*, p. 88.

² *Papers Relating to Martial Law in South Africa* (Cd. 981), (1902), p. 123.

³ *Ibid.* pp. 172 ff.

⁴ Ariga, *op. cit.* p. 101.

⁵ *Ibid.* p. 117.

⁶ Pillet, *op. cit.* p. 159.

⁷ *American Instructions*, Article 128.

entered into. It is said that the prisoners paroled by Grant at Vicksburg in 1863 were declared released from their parole by the Confederate authorities, and returned to the fighting ranks before they had been exchanged.¹ The reason appears to have been that the paroling was not carried out with all the necessary formalities, and though this is denied by Grant, it served as a pretext at any rate for the breaking of the contract by the Richmond Government.² In a matter which is *stricti juris* like the giving and acceptance of parole, no loop-hole should be left for any quibbling evasion of the obligation undertaken. Germany complained, and with good reason, that a great number of French officers violated their paroles in 1870-1. The *Kriegsbrauch im Landkriege* (p. 17) gives the numbers as follows: 3 generals, 1 colonel, 2 lieutenant-colonels, 3 commandants, 30 captains, and 106 other officers. It is hard to believe that in an army with the great and honourable traditions of the army of France so many commissioned officers would have failed in the strict requirements of honour. In many cases there seems to have been a misunderstanding on the part of the paroled officers themselves as to the nature of the obligation undertaken by them. In one case at least an officer was released after signing a document, drawn up in a tongue which he did not understand.³ On the other hand, there is evidence that pressure, official and private, was brought to bear on the officers who returned to France on parole, to induce them to set the cause of France before their personal safety and wishes, and to disregard a promise which could be readily shown to have been exacted under duress. One French officer, Lieutenant-Colonel Fourchault, after being liberated on parole at Metz, gave himself up again to the Red Prince and begged to be sent to Germany, as "he feared that forcible measures would be employed by his countrymen to compel him to rejoin the army."⁴ Similarly, after Sedan, twenty officers voluntarily returned to captivity in order to avoid importunities to break their parole and re-enter the army.⁵ The French Government of National Defence displayed an unworthy readiness to accept the services of paroled

Violation
of the
parole by
French
officers in
1870-1.

¹ Draper, *op. cit.* Vol. III, p. 66; Sherman, *Memoirs*, Vol. I, p. 356.

² Grant, *Memoirs*, pp. 336-7.

³ Pillet, *op. cit.* p. 159.

⁴ Cassell's *History*, Vol. II, p. 51.

⁵ *Ibid.* Vol. I, p. 423.

officers, and no doubt its attitude in the matter created a general atmosphere of lax judgment as regards the *parole d'honneur* and led to its being set aside in many cases besides those in which an informality in its administration, or a misunderstanding as to what was undertaken, gave some justification for regarding it as null and void.

The case
of General
Ducrot.

The case of General Ducrot shows that officers of the highest rank were disposed to take a somewhat lax view of their duty in connection with pledges of this sort. He was taken prisoner at Sedan, and he pledged his word of honour to proceed thence to Pont-à-Mousson and to report himself there, prior to being sent to Germany as a prisoner of war. What he did is best shown by his own evidence before the court of honour at Paris, presided over by General Trochu, before which he was tried a little later; he stated that he proceeded to Pont-à-Mousson as arranged,

but was told that the first train was full, and that he must wait for the next; and that thereupon he considered himself freed from any obligation, as he could not be responsible for the Germans not having secured his person. He then asked if he might visit a friend in the town, and received permission, without any pledge being asked or given as to his return. At this friend's house, he and his two aides-de-camp were supplied with peasants' dresses and a country cart with a load of potatoes. The general, dressed in a blouse and trousers, with a pipe in his mouth, a peasant's hat on his head, and bare feet thrust into sabots, rode on the side of the cart; one of his aides-de-camp led the horse, and the other sat on the potatoes. In this way they passed safely through the Prussian lines. General Trochu and the other members of the court, with the exception of a brigadier and a lieutenant-colonel, who remained neutral, decided in Ducrot's favour.¹

It may be admitted that Ducrot did not break the letter of his engagement—for he reported himself as he had promised; but assuredly he broke the spirit of it. The incident is noteworthy mainly as showing the difficulties and pitfalls which surround the whole subject of releases on parole. So much trouble, dispute and recrimination have arisen out of paroling that one is inclined to agree with Guille's verdict that "if captivity is an evil, it is better to submit to it wholly than, by a bastard

¹ Cassell's *History*, Vol. II, pp. 50-1.

compromise, to obtain a liberty which is restricted and often heavy to bear.”¹

Connected with the question of parole is that of exchange. The exchange of prisoners of war,” said the Brussels project, “is regulated by a mutual understanding between the belligerent parties.” This clause was suppressed at the first Hague Conference. “An exchange,” says the report, “can always result from an agreement between the parties,”² so that it appeared unnecessary to mention the subject in the code. Dr. Lawrence speaks of exchange as being a common practice. One of the general laws that he lays down is that “Prisoners of war are cared for and exchanged,” and in another place he says, “Exchange has been the rule in modern times and ransom has become obsolete.”³ It seems to me that exchange is almost obsolete, too. The last great war in which prisoners were exchanged on any considerable scale was the American Civil War, and in that war the system was abandoned after the first few years. The cases in modern European wars have been exceptional. There were some exchanges at Metz in the Franco-German War. In August, Prince Frederick Charles agreed to an exchange of wounded and prisoners. “My object,” he said at the time, “is to get as many of our wounded as possible from Metz before it suffers from the effects of bombardment and hunger.”⁴ Again, at the beginning of September, Bazaine turned about 750 Prussian prisoners out of the town, to save supplies. “The courtesy of war,” says Hozier, “demanded that a like number of French should be returned, but just then Prince Frederick Charles had no prisoners, having sent them off to Germany. On September 9, however, 750 men, chosen from different regiments taken at Sedan, were sent into the town, bearing only too palpable evidence of the tale of France’s humiliation.”⁵ One may assume that Hozier’s last words indicate the real reason for the Red Prince’s action and that policy rather than the courtesy of war prompted this exceptional resort to the system of exchange. In the Spanish-American

The exchange of prisoners of war.

Exchanges rare to-day.

¹ Quoted, Bonfils, *op. cit.* sec. 1138.

² Hague I B.B. p. 143.

³ *International Law*, pp. 333, 335.

⁴ German official *History*, Part I, Vol. II, Appendix 55.

⁵ *Franco-Prussian War*, Vol. II, p. 101.

War, the few exchanges that took place were also resorted to in very special circumstances. General Shafter, with the double object of relieving his overworked medical staff and of disproving the idea that the Americans invariably murdered their captives, released 28 wounded Spanish prisoners on parole, and at the same time exchanged eight other prisoners (or fourteen, according to one account) for Lieutenant Hobson, the hero of the *Merrimac*, and his seven comrades.¹ This was in July, 1898; already, in May, a Spanish Colonel and a "military doctor" appear to have been exchanged for two correspondents of the *New York World* captured by the Spaniards.² How it came about that the "doctor" was taken prisoner I do not know. Hardly any cases of exchange occurred in the Anglo-Boer War; there was a kind of exchange of a few wounded prisoners at Paardeberg, when Cronje allowed the British wounded to leave the beleaguered camp on Lord Roberts promising to send an equal number of the Boer wounded (whom Cronje sent out with the others) to the German Red Cross Hospital at Jacobsdaal, to be liberated on their recovery.³ In the Russo-Japanese War the only case of exchange was one between three Russian naval officers who were taken prisoners from the Volunteer Fleet steamer *Ekaterinoslav* and three Japanese naval officers captured on Japanese transports. These officers were considered to have been taken prisoners under special conditions.⁴ "At one time," says Professor Ariga, "negotiations took place between the two Governments on the subject of an exchange of prisoners of war, but nothing came of them."⁵

Controversy between Washington and Howe in 1777 as to exchanges;

Although general exchanges of prisoners are practically obsolete in modern wars, it is possible that they may come into fashion again, and a few historical precedents bearing on the war rights concerning them will not be out of place. An interesting point arose in the American Revolutionary War.

In 1777 an agreement for an exchange of prisoners was made between General Washington and Sir W. Howe, in which it was

¹ Titherington, *op. cit.* pp. 300-1; *R.D.I.* September-October, 1898, p. 790.

² *R.D.I.* *loc. cit.*

³ *German Official Account of the War in South Africa*, Vol. I, p. 264; Maurice, *Official History*, Vol. II, p. 163.

⁴ Kinkodo Company's *History*, p. 989.

⁵ Ariga, *op. cit.* p. 117.

merely stipulated that "officers should be given for officers of equal rank, soldier for soldier, citizen for citizen." When the agreement came to be carried out, the Americans objected that "a great proportion of those sent out" by the English "were not fit subjects of exchange when released, and were made so by the severity of their treatment and confinement, and therefore a deduction should be made from the list" to the extent of the number of non-effectives. Sir W. Howe, while denying the alleged fact of severe treatment, and referring the bad state of health of the prisoners to the sickness which is said to have prevailed in the American army at the time, fully granted "that able men are not to be required by the party, who contrary to the laws of humanity, through design, or even neglect of reasonable and practicable care, shall have caused the debility of the prisoners he shall have to offer to exchange."¹

A further controversy on the same question arose in the war between England and Spain on the one side and France on the other in 1810. England had at that time nearly 44,000 French prisoners in her hands; France had over 11,000 English prisoners and over 38,000 Spanish. England proposed to exchange 11,000 Frenchmen for the English prisoners. France refused to agree to anything but a general exchange of all prisoners and demanded that for every three Frenchmen one Englishman and two Spaniards should be handed over. To this the English Government would not agree, rightly holding that a Spanish soldier was far from being the equivalent in value of a British or French one, but subsequently agreed to an exchange on the condition that the English prisoners should first be exchanged against an equal number of Frenchmen. This condition was rejected and the negotiations fell through.²

In the Secession War Sherman tried to extend the principle illustrated in the case of 1777—that a belligerent who holds healthy and efficient soldiers as prisoners of war has a right to demand in exchange men of equivalent fighting value—to justify a pretension that soldiers whose service is nearly expired need not be accepted in exchange for men whose engagements have a longer time to run. This claim of Sherman's was successfully withstood by Hood, who wrote (11th September, 1864):—

All captives, taken in war, who owe no obligations to the captors, must stand upon the same equal footing. The duration of

¹ Hall, *International Law*, p. 412.

² *Ibid.* p. 413.

and
between
France
and Eng-
land and
Spain in
1810.

Sherman's
attempt
to dis-
criminate
between
short and
long ser-
vice men
in ex-
changes.

their terms of service can certainly impose no duties or obligations upon the captors. The volunteer of a day, and the conscript for the war, who may be captured in war, are equally subject to all the burdens, and equally entitled to all the rights secured by the laws of nations. This principle is distinctly conceded in the cartel entered into by our respective Governments, and is sanctioned by honor, justice, and the public law of all civilised nations.”¹

Does an exchange operate as a double parole?

“In the absence of an agreement to the contrary,” says Bluntschli, “exchanged prisoners will not participate as soldiers in the existing war.”² This is to make every exchange a double parole—an essentially dangerous doctrine. Every act of paroling ought to be very clear and definite and to *imply* a parole is to court misunderstanding and trouble. The ordinary rule which governs the interpretation of legal and diplomatic acts, that they should be construed in favour of freedom, is a far preferable rule to apply to the case of exchanges. The *American Instructions* (Article 105) make the conditions as to not serving for a certain period one which may or may not be expressed in a cartel of exchange. If not expressed, then there seems to be no ground in custom or logic to read such a condition into the agreement.

What persons can be made prisoners of war?

Article XIII brings up the question—What persons can be made prisoners of war? First, with the exceptions mentioned in the Geneva Convention, all military individuals, combatants or non-combatants (in the sense referred to on page 58, *supra*), may be captured; next, persons not commissioned or enlisted, but employed permanently by an army as pay-clerks, telegraph-operators, engine drivers, or, generally, in any civilian capacity with an army in the field. Then come the individuals who are not officially employed by an army, but follow it for their own purposes, such as press-correspondents, sutlers or contractors. These persons are entitled to be treated as prisoners of war if they can produce a permit from the commander of the army they accompany. Then there are a number of persons temporarily employed by an army—guides, for instance, teamsters, messengers, etc., who are usually regarded as liable to capture. No mention is made in the *Règlement* of such temporary employees. Is it intended that they shall not be captured at

¹ Bowman and Irwin, *Sherman and his Campaigns*, pp. 229-232.

² *Droit International Codifié*, Article 613.

all? Professor Pillet holds that to make them prisoners would be to treat them with unnecessary rigour. "The services," he says, "which they render to the troops are purely temporary, and in no way justify their being assimilated to combatants proper. Besides, these persons are requisitioned to lend their assistance to the army, and it is unjust to punish them (by making them prisoners) for doing what they had no option but to do."¹ He goes on to point out that it is impracticable to provide such persons with a permit—they are often requisitioned for a day only, and their numbers alone are an obstacle to finding a special authority for each, which, moreover, has never been required in practice.²

High civil functionaries, whether accompanying an army or not, are also liable to be made prisoners of war; to capture a war minister, for instance, or a sovereign, or a Lord Chancellor, would be justifiable as tending to disorganise the administration of the enemy State and to weaken indirectly its fighting efficiency. The two following classes of persons are also given in the German Manual as among those liable to capture:—

(1) All persons whose liberty may constitute a danger to the hostile State: for example, journalists animated by a hostile spirit, political leaders [not necessarily ministers] whose influence is considerable, priests who would excite the population, etc.

(2) The general population of a province or country which rises *en masse* to defend itself.³

There are precedents in the Secession, Seven Weeks' and Franco-German Wars for the seizure of notable citizens by an invading army, but they are rather cases of reprisals than of the application of the rule laid down in the former of these paragraphs of the *Kriegsbrauch* and I shall deal with them later as such. The principle affirmed in the paragraph in question is an extremely dangerous one, unless most rigidly limited to the case of military occupation. As presented in the German Manual, generally and unconditionally, it would justify a foreign commander who had landed in Devon or Yorkshire in sending a raiding party to seize and carry off the editor of the *Morning Post* or of *The Times*, or the Archbishop of Canterbury, if these

High civil functionaries are liable to capture.

German rule authorising capture of influential non-combatants;

a dangerous principle.

Pillet, *op. cit.* p. 194.

² *Ibid.* p. 463.

³ *Kriegsbrauch im Landkriege*, p. 17.

gentlemen had advocated a stern resistance to the invader in their editorials or sermons. One cannot conceive that such a measure as this would commend itself even to the German school of military thought. To proscribe liberty of thought and speech among persons who are living in their own land and under their former Government, is to claim the right for a State to exercise concurrent sovereignty in the State with which it is at war. No one could seriously put forward such a claim unless he had had the misfortune to be bred and nurtured in a State which laboured under a peculiarly virulent attack of *lèse majesté* bacillus. Confined, however, to places militarily occupied by an invader, the principle of the German Manual may be upheld. The occupying army must make its authority obeyed within its sphere of occupation, and to remove individuals whose influence or utterances would endanger the general peace is preferable to following a *laissez faire* policy which is likely to culminate in insurrection and resulting reprisals.

Non-combatants are not liable to capture, even in a territory where conscription is in force.

Levées en masse are given combatant privileges by Article II of the *Règlement* and the individuals composing them are therefore entitled to be treated as prisoners of war if captured. Otherwise, the peaceable civil population is free from the liability of capture. There is only one modern historical precedent for capturing even the males of fighting age in a country in which universal service is compulsory. This precedent is furnished by Sherman's action at Atlanta in 1864, when he took about a thousand Georgian citizens prisoners of war, on the ground that the Confederate congress had made all men eligible for service and that these citizens might be detailed for duty at any time.¹ Sherman undoubtedly departed from the accepted usage of war in this instance. An invader has no war right such as he claimed: he can, of course, take all necessary steps to ensure that the adult male inhabitants remain at their homes and can punish them severely if they attempt to join the enemy's active forces, but he has no power under custom or convention to take them prisoners on the sole ground that they are the material for soldiers.

The question of "Concentration" stands somewhat by itself; but as it may be, and has been by some jurists, regarded as a

¹ Bowman and Irwin, *Sherman and his Campaigns*, p. 229.

method of putting stress on a peaceable population by making them prisoners of war, it may conveniently be considered here. Concentration camps are practically internment camps for non-combatants. They have been violently attacked on the ground that the laws of war do not permit of the inoffensive inhabitants of a hostile country, old men, women, and children, being made prisoners.¹ Generally speaking, the objection taken to such camps is sound in principle. Article XLVI of the *Règlement* inculcates respect for "family honour and rights, the lives of individuals, and private property," and it is an interference with this war right of non-combatants to remove them from their homes and intern them in a military camp. Such an extreme measure is only to be justified by very extreme circumstances; in fact, by such circumstances as make concentration not only imperatively necessary for the success of the responsible belligerent's operations, but also the less of two evils for the inhabitants themselves. I have shown that there are circumstances in which the devastation of a country is justifiable.² Such circumstances existed in the Transvaal and Free State in 1900-2, no less than in some of the southern States of North America in 1864-5. The United States authorities did not adopt the system of concentration in 1864-5; were the inhabitants of the Carolinas and Georgia in better case than the inhabitants of the Boer Republics where concentration was adopted? When Sherman occupied Atlanta in 1864, he decided to remove all the citizens from the town, on the ground that his military plans required that the town should be turned into a stronghold or *place d'armes*. The inhabitants, he said to Hood, might go north or south as they preferred. Hood stigmatised Sherman's proposal as unparalleled, for studied and ingenious cruelty, by anything recorded in "the dark history of war," and protested against it "in the name of God and humanity." Sherman replied that it was not unprecedented, for General Johnston had done the same in his retreat, and it was not cruelty, but a kindness, to remove the people of Atlanta from scenes to which their kinsfolk should have felt shame to expose them. "In the name of common sense," he ended, "I ask you not to appeal to

The case of "Concentration."

The system of Concentration compared with Sherman's treatment of the Georgians.

Correspondence of Sherman and Hood.

¹ Bonfils, *op. cit.* sec. 1126.

² *V. supra*, pp. 133-9.

a just God in such a sacrilegious manner. . . . Talk thus to the marines but not to me." In a final, bitter minute, Hood commented scathingly on the "kindness" of exiling a whole city and driving men, women, and children from their houses at the point of the bayonet; "and because" (he said) "I characterise what you call a kindness as real cruelty, you presume to sit in judgment between me and my God."¹

But Sherman would not revoke his order. To the Mayor and Councilmen, who petitioned him to reconsider his attitude, he replied in words that have become famous. "War is cruelty," he said, "and you cannot refine it. You might as well appeal against the thunderstorm as against the terrible hardships of war. . . . Now you must go, and take with you the old and the feeble, feed and nurse them, and build for them, in more quiet places, proper habitations to shield them against the weather, until the mad passions of men cool down and allow the Union and peace once more to settle over your old homes at Atlanta."²

Sherman turned a cityful of people adrift at Atlanta, and his action has been upheld by responsible writers as "amply justified on military grounds."³ When, in somewhat similar circumstances, military exigencies required the clearing of the country in South Africa, the British authorities did not, like Sherman, turn the inhabitants out of their homes and farms to shift for themselves; they removed them to camps, in which they were free, at least, from the fear of starvation or native violence. Which was the more humanitarian plan, Sherman's or Kitchener's? I submit that the answer cannot be doubtful. No doubt, the removal of the Boer non-combatants was prompted in part by military reasons, but the motive of humanity was present too, and was the stronger motive of the two. Were it not so, the inhabitants would have been simply dispossessed, as they were at Atlanta, or sent over to the Boer lines, as was done with certain Boer families in the autumn of 1900. This latter measure was a still more rigorous one than concentration, and was, moreover, objectionable by reason of the pretext given

Kitchener's
system
more
humane
than Sherman's.

¹ Sherman, *Memoirs*, Vol. II, pp. 121-4.

² *Ibid.* pp. 125-7.

³ See Wood and Edmunds, *History of the War in the United States*, p. 403.

for it in the British official *communiqué* to General Botha. "I need not say," wrote the British commander, "how painful this measure is to me, but I am forced to adopt it by the apparent determination of your Honour and your Burghers to continue the war when all doubt as to its final issue has disappeared."¹

The expedient had already been tried of turning the Boer families adrift.

This was to punish non-combatants for the resistance of their combatant fellow-countrymen, a measure not consonant with the laws and usages of war. Earlier in the same despatch, reference had been made to the necessity of finding provisions for the families and the fact that information was transmitted to the combatant Boers, as warranting the removal of the families of Burghers in the field from the occupied towns. It would have been well if after these words, the moving finger, having writ, had refrained from moving on; for, remembering that the Boer forces were indistinguishable from the peaceable population, one cannot question the British occupant's right to remove non-combatants who were, to all intents and purposes, either spies or war-traitors, and his action, severe as it was, is justifiable on these grounds. Botha protested strongly against the measure adopted by the British commander. "I profoundly regret," he wrote, "that the determination of my Burghers and myself to continue the struggle for our independence is to be avenged by you on our wives and children, for it is the first case of this kind in civilised war of which I am aware, and I can only protest against the measure which you have proposed, as contrary to all the principles of a war between civilised peoples, and as being extremely cruel to the women and children."² One cannot but admit that Botha was in the right as to the particular point he referred to; he wisely attacked the weak spot in the British argument and ignored the real and justifiable reason for the removal of the families. But to return to the Concentration Camps. It may be admitted that the mortality therein was "terribly" high—this was admitted by Mr. Chamberlain himself in the House of Commons;³ but to say that the camps were instituted for the purpose of killing off the Boer population is to be simply

Botha's protest.

¹ Despagnet, *op. cit.* p. 298; *Times History*, Vol. IV., p. 393.

² Despagnet, *op. cit.* p. 299.

³ *Wyman's Army Debates*, Session 1902, Vol. I, p. 133.

The principle of the Concentration Camps of 1901-2 was a humane one.

ridiculous. The high death-rate was due to many causes. The sites chosen for the camps were mostly chosen on purely military grounds, and were often unsuitable; the medical and sanitary staff was at first insufficient; above all, the Boers themselves "proved to be helpless, utterly averse to cleanliness, and ignorant of the simplest elements of health and sanitation."¹ Yet, despite faults of management and administration, the Concentration Camps were a notable effort to deal humanely with a civil population who were the victims of a necessary military policy of devastation. At the Vereeniging Conference Botha made a statement which those who condemn the British measures have consistently ignored. "To-day," he said, "we are only too glad to know that our women and children are under British protection."² If devastation is justified, then some system of concentration is not only justified, but demanded by considerations of humanity. At the last Hague Conference, some of the delegates put forward the view that concentration was implicitly forbidden, because not mentioned, by the *Règlement*. This view did not commend itself to the Conference generally, but a Japanese proposal that internment should be resorted to "only in case of military necessity" was recorded in the *procès verbal*.³

Press correspondents, etc., are in a different position from ordinary prisoners of war.

As was pointed out by the Italian delegate at Brussels, there is a difference between the ordinary prisoners of war and those referred to in the present Article XIII. The latter are captured, not to weaken the enemy, but to prevent their returning to the hostile camp after examining the position and seeing the forces of the other belligerent. No measure beyond what is necessary to prevent their escape should, therefore, be applied to these persons. They should neither be subjected to forced labour nor should the captor's military laws and regulations be applied to them. On the other hand, it might be required that they should pay for their own maintenance.

¹ *Times History*, Vol. V, p. 88.

² *Ibid.* p. 405.

³ See *The Times* of 25th July, 1907. A mass of information about the concentration camps in South Africa will be found in the Blue Books, *Reports, etc., on the Working of the Refugee Camps*, Cd. 819 (1901), and *Further Papers, etc.*, Cd. 853 (1901). Particulars will be found therein of the organisation of the camps, the discipline, feeding, housing, etc., of the families, as well as instructive mortality tables.

The Committee of the Conference recorded these views of the Italian delegate in the Protocol.¹ During the war of 1877-8, Captain Creagh, correspondent of the *Daily Telegraph* was captured by Cossacks while retreating with Muktar Pasha's army from Kars; he was allowed to rejoin the Turks at Erzeroum by a circuitous route instead of being sent back to Russia as a prisoner of war.² Japan, too, refrained from treating correspondents and the other persons referred to in Article XIII as prisoners of war, in the 1904-5 struggle. She sent them back to Japan, where they were handed over to the consuls of their respective countries.³ In the Spanish-American War, Spain captured the correspondents of the *New York World* and held them as prisoners of war for a time, but finally allowed them to be exchanged—a privilege not granted to prisoners generally during this war.⁴ Usually it is not to a belligerent's advantage to treat correspondents, etc., as prisoners of war, a temporary detention and release by a circuitous route being sufficient to safeguard military interests, but it is important that such persons should have the war right given to them by this Article, if the capturing commander finds it necessary to detain them. All that the Article lays down is that if they are captured, they are entitled to the privileges of prisoners of war. On the other hand, they cannot be assimilated to surgeons and allowed the right of neutrality, as an abortive proposal at the Brussels Conference would have laid down.⁵

May a foreign officer acting as *attaché* with the one belligerent be made prisoner of war if he falls into the other belligerent's power? Most authorities would say, yes, if proved to have forfeited his neutral character by directing operations or by taking an active part in hostilities in other ways.⁶ To me this view seems doubtful. If the *attaché* has transgressed in the manner mentioned, then the capturing belligerent is undoubtedly entitled to regard and treat him as an enemy—for he has acted as such—and to detain him as a prisoner of war, but only

It is usual to let them return by a circuitous route.

Can foreign *attachés* be made prisoners?

¹ Brussels B.B. p. 289.

² E. Vizetelly, *Reminiscences of a Bashi-Bajouk*, p. 309.

³ Ariga, *op. cit.* pp. 122-3.

⁴ *R. D. I.* September-October, 1898, p. 792.

⁵ Brussels B.B. p. 260.

⁶ Pillet, *op. cit.* p. 196; Holland, *Laws and Customs of War*, p. 14.

until such time as it is convenient to send him back to his country. To retain him indefinitely as a prisoner is to show disrespect for the neutral sovereign who accredited him to the other belligerent, who is, presumably, not responsible for the improper conduct of his agent, and who should be left to punish the offender—an officer of his army—therefor. *Attachés* who have not failed in their duty of neutrality cannot be made prisoners; but the jurists are not in agreement as to the exact treatment to be accorded them. Professor Pillet maintains that the captor has only one right in regard to them—the right to forbid them to remain within the lines of his army; “their diplomatic character,” he says, “assures them an entire independence.”¹ Professor Holland holds, on the contrary, that the captor is entitled to insist on their leaving the theatre of war and to exact from them a promise that they will not rejoin the army they were accompanying without his consent.² Perhaps the truth of the matter is to be sought midway between these two views, in a kind of compromise between the claims of international comity and of military necessity. A belligerent could hardly allow a captured *attaché* the complete liberty of action which Professor Pillet contemplates; but unless there were abnormal and special military objections in any given case, he might safely show the *attaché* and the neutral Government more consideration than Professor Holland’s view would allow. It would be unfair to the neutral Power if the capture of its military observer were to deprive it of his services—the services of a picked man and an expert—for the remainder of the struggle. The Government in question might not be prepared to send out a fresh *attaché* at once, and, in any case, valuable time would be lost during which no military information would be forthcoming, to the disadvantage of the neutral power. The military interests of the capturing belligerent would seem to be safeguarded by allowing him to use all means to prevent the *attaché* obtaining information as to his forces and movements, and to send him back by a circuitous route. When Lord Roberts entered the Orange Free State in 1900, he captured the Russian and Dutch military *attachés* and dealt with them in the way I have described, sending them back to the Boer

A precedent of
1900.

¹ Pillet, *loc. cit.*

² Holland, *loc. cit.*

army by way of Lourenço Marquez.¹ But the convenience of the neutral power and its agents cannot claim precedence of the military interest of the belligerent; and if, in any case, a captured *attaché* has been able to obtain (unintentionally, of course) military information which might prove of great service to the other army if he were allowed to rejoin his post, then military necessity would justify his being dealt with in the way described by Professor Holland.

I also venture, with diffidence, to disagree with Professor Holland as to the status of foreign officers acting as press correspondents. He places them on the same level with *attachés* and prescribes identical treatment for them. But if foreign officers act as correspondents, they have no diplomatic function; they are the agents of a newspaper company or syndicate, not of a sovereign power, and their quality of officers appears to me to be merged and lost in their quality of journalists. I cannot see that they differ in any way from ordinary war correspondents. This is Professor Pillet's view too—"the situation of these spectators of the war," he says, "is not different from that of press correspondents and they are under the same obligations."²

If the Geneva Convention is the abiding monument of Henri Dunant, the name of another great and equally unrecognised Frenchman, Edouard Romberg, will always be associated with the institution of the Bureaux for information relative to prisoners of war. The former's work, *Un Souvenir de Solferino*, was not more responsible for the Geneva Conference and its results than M. Romberg's *Des Belligérents et des Prisonniers de Guerre* was for the Information Bureaux which the first Hague Conference sanctioned. Some of the provisions incorporated in Articles XIV, XV, and XVI had already been embodied in the regulations of various countries and were put into practice in some recent wars—notably by Prussia in the wars of 1866 and 1870-1; but they lacked the international authority which those Articles have now given them. In the Russo-Turkish War, for example, the Russian Government furnished lists of the Turkish prisoners at regular intervals to both the Turkish Government and the English minister at St. Petersburg; but

Foreign officers acting as press correspondents are simply war correspondents.

The Bureaux of Information.

¹ Mackern, *Sidelights on the March*, p. 69.

² Pillet, *op. cit.* p. 196.

Professor de Martens is careful to point out that his Government "was in no way bound to furnish information on this subject to the Porte during the course of the war."¹ The rule as to collecting objects of personal use, found on the battlefield or left by deceased prisoners, is a notable advance on existing practice. When General Phil Kearney, the veteran Algerian fighter and the hero of Boker's beautiful ode, "Lay him low," fell on the field of honour, his horse and sword were sent back to his widow by Lee's orders as a mark of courtesy towards a gallant opponent—one who had two mourners—his friend and his foe, as Fitzhugh Lee said of John Sedgwick.² But such solicitude as was shown here was reserved for officers of high rank, and commanders cared little whether the personal property of the fallen enemy, or, indeed, of their own dead, went to enrich the first soldier who chanced upon it or the "hyenas" of the battlefield.

The
Japanese
Bureau
of 1904.

The Bureau of Information which was established in Japan by Imperial decree upon the outbreak of hostilities in 1904 was administered by a director (of the rank of general or colonel) and two secretaries (naval or military officers, or civilians of the rank of *sonin*), assisted by clerks. The director was responsible to the War Minister and was empowered to call for all necessary information from the various naval or military authorities. The functions of the Bureau were as indicated in the Hague Articles, but it also recorded any crimes or disciplinary offences committed by the prisoners and collected information about the enemy's dead who fell in action. Monthly reports were made to the Minister of War.³

Prisoners'
letters are
liable to
censor-
ship.

Although it is not expressly stated in Article XVI, it is to be understood that letters to or from prisoners of war are liable to censorship.⁴ This is an obvious military precaution and has always been the rule.⁵ Out of the censorship in the Crimean

¹ *La Paix et la Guerre*, p. 484; see also p. 477.

² White's *Lee*, p. 232.

³ Ariga, *op. cit.* pp. 97-100.

⁴ See British official *Laws and Customs of War*, p. 16.

⁵ See, e.g., Cassell's *History*, Vol. I, p. 423, and Ariga, *op. cit.* p. 120, who says: "They (the prisoners) were allowed to correspond by post and telegraph, in Russian, Japanese, French, English and German, after submission to the censorship of the military authorities."

War there arose a good tale, which I hope I shall be forgiven for transcribing from the pages of Russell:—

Some time ago an English officer, who is now a prisoner at Simpheropol, received letters from his friends in England, who were at that time ignorant of his fate. It is a rule to forward all letters to prisoners after they have been opened and read. One of those sent to the gentleman in question was from a young lady. She requested the officer to take Sebastopol as soon as possible, and to be sure and capture Prince Menschikoff in person, adding that she expected to receive a button off the Prince's coat, as a proof of the young gentleman's prowess. When this letter was delivered to the officer, it was accompanied by another from the Prince, enclosing a button, and stating that he had read the young lady's letter, and regretted he could not accede to her views as regarded the taking of Sebastopol or himself, but that he was happy to be enabled to meet her wishes on a third point, and that he begged to enclose a button from his coat, which he requested the gentleman to forward to the lady who was so anxious to possess it.¹

Article XVII is an amendment made by the last Hague Conference of a provision of the Conference of 1899, which gave officers who were prisoners of war the privilege of receiving advances of pay from their captor, if they were entitled to pay during captivity under their army regulations: the amount of the advances to be repaid by their Government. The amended Article entitles them to be paid, even if their service regulations deprive them of pay while in captivity, and the rate authorised is that of the capturing belligerent's army, not their own. As provided in the old article, the captor is to be re-imbursed, but, as Professor Holland points out, there is nothing to prevent the latter undertaking in the Peace Treaty to bear the cost of the payments he has made. The issue of pay to captured officers has been the rule in modern wars. In the Franco-German War, the French officers interned in Germany were paid from £1 16s. to £3 15s. *per mensem* according to rank. France treated her captives more liberally; subalterns received £4 a month, and generals £13 10s., and even privates were paid—a rare and hardly necessary concession.² The Turkish pashas, superior officers, and subalterns who were prisoners of war in Russia in

The pay-
ment of
prisoners
of war.

Modern
practice
regarding
payment.

¹ Russell, *Crimea*, p. 328.

² Hall, *International Law*, p. 406; Pillet, *op. cit.* p. 154.

1877-8 received the pay of Russian officers.¹ In the Anglo-Boer War, the British officers received no pay from the Boer authorities, but the American Consul at Pretoria courteously undertook to advance to them such sums as they required, and to recover from the British Government.² In 1904-5, the Russian Government authorised the issue of about £20 *per mensem* to general officers who were captured, £12 to senior officers, and £7 to subalterns. Russian officers in Japan received a ration allowance of 1s. 2d. *per diem* and also a monthly allowance of 12s. to meet their miscellaneous expenses.³ It will thus be seen that great inequality, corresponding to the state of the captor's purse for the most part, has marked the payment of prisoners of war, and the rule allowing captured officers to be paid at the (final) charge of their own State will clearly make for a more fair and consistent practice in the matter. The difference in treatment of officers and men as regards the issue of pay is reasonably to be explained by their different standards of living and the disproportion between their consequent necessary expenditure. Although in a campaign officers are ready and willing to share their men's fare, there is no reason that they should do so under the altered conditions of internment. The men, moreover, may be employed and paid for their work, while officers may not. There is also the consideration that the payment of officer-prisoners serves to make their lot less relatively inferior to that of paroled officers than it might otherwise be, and all nations have an interest in encouraging that keen soldierly spirit which prefers captivity with the rank and file to freedom without them.

Freedom
of con-
science of
prisoners.

Article XVIII guarantees freedom of conscience and of worship to prisoners of war. There may be cases, of course, in which it is impossible to provide for the proper celebration of the prisoners' worship—for instance (as Professor Holland points out), if there is no chaplain of their denomination present.

¹ De Martens, *op. cit.* p. 479.

² The Boer Government supplied a free issue of clothes, bedding (a mattress and two rugs) and a towel, and a daily ration of a half-pound of meat, a pound of bread, and tea or coffee, potatoes and salt (see Adrian Hofmeyr, *The Story of My Captivity during the Transvaal War*, pp. 118-9).

³ See Ariga, *op. cit.* pp. 126, 112; Vladimir Semenov, *The Price of Blood*, p. 126.

The Japanese raised no objection to the practice of even the most *bizarre* religious cults among the Russian prisoners in 1904-5. Professor Ariga mentions one which forbade its devotees to sleep while the moon had a certain form ; during all this time they had to remain in the open and pray.¹ Provided religion is not made a cloak for sedition and disturbance, no civilised nation is likely to interfere with its observance, however grotesque or steeped in superstition, by prisoners of war. The wisest policy, as it is the most philosophic and liberal, is to follow the example of the Confederate General (the story is told of more than one) who was asked by a clergyman with Union sympathies if he might pray for President Lincoln, and replied, "Certainly, I'm sure he needs it!"

Any difficulty which might have arisen out of the provisions of Article XIX as to prisoners' wills is overcome by the exceptional privileges which both English law and those European systems of jurisprudence which derive from the Roman code grant to soldiers as regards the making of a "last will and testament." A nuncupative or verbal will, or a private letter expressing the writer's wishes as to the disposal of his effects, is commonly regarded as having the full legal effect of a will. The soldier who is captured is still considered as being "on actual military service," and though he has not acquired a domicile in the captor's country, a will drawn up in accordance with the regulations of the captor's army would probably be accepted in every case as a sound "military will"—certainly by the Probate Court of England.

Provision is usually made in the Treaty of Peace for the speedy repatriation of prisoners of war. "Some delays," says Professor Holland, "must of course occur, on account of (1) insufficiency of transport; (2) obvious risk in at once restoring to the vanquished Power the troops of which it has been deprived; (3) some prisoners being under punishment for offences committed during their imprisonment."² Obviously prisoners cannot be repatriated the moment peace is signed, by being placed on a magic carpet and whisked off to their homes. There are many details of administration to be arranged before

The wills
of
prisoners.

Repatria-
tion of
prisoners.

Necessary
delay in
repatriat-
ing
prisoners.

¹ See Ariga, *op. cit.* p. 119.

² British official *Laws and Customs of War*, p. 17.

they can be sent back ; baggage has to be packed and removed, transport provided, subsistence *en route* arranged for. There were difficulties of this kind in 1871 and in 1902, in the first case owing to the enormous number of French prisoners in Germany, in the second, owing to the Boer prisoners being interned at great distances overseas. The French Government railways were put at the service of the German authorities for the transportation of the prisoners in 1871, but, even with these facilities, the repatriation was a slow process. The Boer prisoners had to be brought back from India, Ceylon, Bermuda, and St. Helena, and though the repatriation commenced within a month of the signing of the Vereeniging Treaty, nearly three thousand remained in the internment camps at the end of the year.¹ The repatriation of the Spanish prisoners in 1898 was carried out by the United States Government with exceptional despatch. The terms of Toral's surrender provided for the return of all the troops in Cuba to Spain, without delay, and the shipment began on 9th August, the work of transportation being entrusted to a Spanish shipping line, the *Compania Transatlantica Española*, which was employed for two reasons: it made the lowest tender for the service, and the Washington War Department wished to avoid any charge of ill-treatment of the prisoners being laid at any American door, as might have happened had an American company been employed. All the troops—about 23,000—were embarked by 17th September.² The arrangement was both humane and business-like.

A belligerent must not delay repatriating his prisoners because of possible danger to himself from their release.

The second exception referred to by Professor Holland is an extremely dubious one. There is no authority for it in the *Règlement* itself, nor in the unwritten usages of war as reflected in the pages of the jurists. To allow a belligerent to retain prisoners of war because they might be used to renew the struggle would be to sanction a possibly indefinite retention of the troops of an amicable sovereign Power (peace having been made) and to make the provisions of Article XX a dead letter. If the capturing belligerent has to go to such an extreme length as this to safeguard himself, he would do better not to sign the Peace Treaty at all. The circumstances in which the measure

¹ *Wyman's Army Debates*, Session 1902, Vol. II, pp. 633, 1146.

² Titherington, *op. cit.* pp. 326 7.

contemplated by Professor Holland would be justified appear very unlikely to arise in a war between modern civilised Powers.

Professor Holland's third exception is also mentioned by the German General Staff jurist,¹ and has the authority of the Hague delegates of 1899, as expressed in the Protocol of the Conference. An addition to Article XX was proposed, stating that a prisoner of war could not be detained, nor could his liberation be deferred, on account of any sentence pronounced or any event which occurred since his capture, except for crimes or delicts under common law. The addition was suppressed unanimously, on the ground that discipline must be maintained and surrounded with adequate sanctions up to the very last day of captivity.² A further case in which repatriation may be deferred is where a prisoner is awaiting trial for an offence against the laws of war.³ Article 6 of the Peace Treaty which closed the last Anglo-Boer war ran as follows :—

Prisoners under or awaiting sentence may be detained.

No proceedings, civil or criminal, will be taken against any of the burghers surrendering or so returning [*i.e.*, to South Africa from captivity] for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts contrary to the usages of war which have been notified by the Commander-in-Chief to the Boer Generals and which shall be tried by Court Martial immediately after the close of hostilities.⁴

¹ *Kriegsbrauch im Landkriege*, p. 17.

² Hague, I B.B. p. 145.

³ *Kriegsbrauch im Landkriege*, p. 17.

⁴ *Wyman's Army Debates*, Session 1902, Vol. II, p. 459. The words "tried by court-martial" should evidently read "tried by a military court under martial law," for only British soldiers or other persons subject to the British Army Act could be tried by court-martial. A Boer officer was tried under this clause by a *Military Court* at Heidelberg on 19th June, 1902, for misuse of the white flag, and sentenced to death (*Wyman's Army Debates, &c.*, p. 1051).

CHAPTER XI

MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE.

(1) *Military occupation; war rights of the Occupant and of the Inhabitants.*

Conventional Law of War:—Hague *Règlement*. Articles XLII to XLVIII.

ARTICLE XLII.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

ARTICLE XLIII.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ARTICLE XLIV.

A belligerent is forbidden to force the inhabitants of territory occupied by him to furnish information about the army of the other belligerent, or about its means of defence. [This article has not been accepted (ratified) by Germany, Austria, Japan, Montenegro, and Russia.]

ARTICLE XLV.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

ARTICLE XLVI.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

ARTICLE XLVII.

Pillage is formally forbidden.

ARTICLE XLVIII.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

WAR law distinguishes between the invasion and the occupation of a hostile territory. If invasion is trespass which is constantly accompanied by assault and battery, occupation is trespass *plus* undisputed possession. Invasion ripens into occupation when the national troops have been completely ousted from the invaded territory and the enemy has acquired control over it. "The state of invasion corresponds to the period of resistance, of combats in which the national army defends, foot by foot, the soil of its country. It ends and gives place to occupation when the defending troops, in despair of maintaining their lines, retreat and go off to seek fresh woods and pastures new for fighting in."¹ During invasion, neither belligerent was complete master of the theatre of war, and if the invader had certain rights as against the population (which I have touched upon in an earlier chapter),² those rights did not extend to a general government of the invaded territory and to responsibility for the maintenance of law and order therein. The right and responsibility of the national Government, whose troops were still in part possession of the soil, remained unaltered in these respects. But once the national troops have been displaced, a new set of conditions arise. In the normal case of occupation, the occupied country is cut off, as it were, by a wall of steel and fire, from the nation to which it belongs. Nature abhors a vacuum in political as well as in physical science, and as anarchy would result if there were no Government, war law recognises in the occupying belligerent a right of government which comes very near to the right of sovereignty. At one period of history the military occupant *did* exercise the

¹ Pillet, *op. cit.*, p. 238.

² *Id.*, *supra*, p. 150-2.

Occupation at one time was equivalent to sovereignty.

The occupant not in the position of a sovereign.

full rights of sovereignty; he forced the inhabitants to renounce their fealty to their legal sovereign and to supply recruits for the occupying army. "In 1756, the Prussians on breaking into Saxony immediately required the States, who were in session, to supply 10,000 men, and two years afterwards 12,000 more were demanded. In 1759 the French made levies in Germany. . . . It was sometimes necessary to stipulate on the conclusion of peace for the restitution of men taken in this manner."¹ But under modern usage and convention the sovereignty of the original owner is regarded as intact. The occupant acquires full sovereignty only when the war ends, and the territory is acquired by him either under the express terms of the treaty of peace, or by virtue of the *debellatio* of the other belligerent, *i.e.*, when the latter is so completely beaten that he gives up the struggle—"throws up the sponge"—and tacitly acquiesces in the wresting from him of the occupied province. This refusal of sovereignty to an occupant is a notable victory, won with difficulty and but yesterday, for the principles of legalism and nationalism combined over the rule of might, and it is strongly supported by considerations of humanity and of general convenience. Until the war ends, "the invader is not juridically substituted for the legal government, for the government, that is, of the invaded State. He is not sovereign of the country. His powers are limited to the necessities of war. When these are respected and satisfied, the invader must, for the rest, leave in force the existing laws and usages. But, by reason of his actual mastery, he assumes the obligations of maintaining order, of allowing the social life of the inhabitants to continue unimpeded, and of respecting their persons. On the other hand, the occupant's duty to himself gives him the right to take all measures requisite for his security, to suppress any resistance which might endanger the advantages he has won."² Thus the occupant's rights are double-based, resting on the necessity for providing some established government in a country which is shut off from its ordinary fount of justice and spring of administration,³ and secondly, on the military interests of the

¹ Hall, *International Law*, p. 464, *note*.

² Bonfils, *op. cit.* sec. 1159.

³ It may indeed happen that the occupation extends to the capital of the invaded State, as was the case in the occupation of the Transvaal and the

occupying belligerent himself. He assumes the reins of government because, otherwise, government there would be none, and such a condition of things would be an evil both for himself and for the population.

In dealing with the question of belligerent qualifications in Chapter III, I have shown that modern war law draws a well-defined line of demarcation between the active military forces and the general body of the population of an invaded country, and I need say but little more on this subject here. In return for non-molestation, non-combatants owe the enemy the duty of quiescence. General Halleck has compared their position to that of prisoners of war on parole. A still better parallel is, I think, the case of persons who are left free under implied recognisances for their good behaviour. If they offend, their property may be estreated, fines may be inflicted upon them, they may be imprisoned, or, in extreme cases, put to death. To purchase the occupant's protection they must accept his rule and obey his legitimate commands. Their strength is to sit still. But the fact of occupation works no change in their national character. Their allegiance to their national Government is not impaired and they will still be liable to punishment, under their national law, if they serve the invader as guides or assist him in arms. Still less can the invader claim their allegiance as if they were citizens of his own State. He must not force them into his ranks, nor may he even compel them to give information concerning the national army and its operations.

The position of non-combatants.

There is undeniably an art in the governing of an occupied country. Mr. Hilaire Belloc has defined discipline very happily as a mixture of petty tyrannies and good fellowship in equal doses, and an older writer said its object was to make soldiers more afraid of their own officers than of the enemy. And the secret of successful occupation is really the disciplining of the conglomeration of more or less disaffected persons who make up the population of an occupied province. One

An occupied province must be sternly disciplined.

Free State in 1900. But that does not affect the position of the invader or of the inhabitants; the former's right is the right of an occupant, not of a sovereign, and the latter are still juridically the subjects of their former Government, even if it be a "perambulating" Government.

The German methods of 1870-1 unduly severe but undeniably effective.

finds Bismarck paraphrasing the words of Helvetius and applying them to the French provinces which the fortune of war left open to the German armies in 1870; it was essential, he said, to inspire the inhabitants with "a greater terror of us than they have of their own Government."¹ Perhaps the Prussian methods were unnecessarily severe—they were certainly far and away more ruthless than those used by any other modern occupant—but they were unquestionably successful. "Their military administration," wrote Dr. Russell to *The Times*, "is most rigorous, and its apparent severity prevents bloodshed and secures their long lines against attack. It is 'death' to have arms concealed or retained in any house. It is 'death' to cut a telegraph wire, or to destroy anything used for the service of the army."² I shall quote a Prussian Proclamation presently from which it will be seen that the councils of war could *only* condemn to death—no lighter sentence could be pronounced. If measures such as these helped to bring one of the great nations of the world to her knees in the space of six months, they were militarily justified; yet one may question their wisdom, politically and ethically, if there was sown of them all over France a seed of hatred which Germany may have to reckon with some day—perhaps some day when she can ill afford to have another foe and one on her flank. One cannot tell what might have happened had the war been prolonged beyond January, 1871; it is quite possible that the "schooling" of the German authorities would have defeated its own end in time and driven the people to the courage of despair. There is a resiliency in the Latin nature which is as unconquerable, in its way, as the dogged persistence of Teutonism, and one can well imagine that, with time to breathe and recover from the first stupefying blows of the invasion, France might have proved to the Germans what Spain proved to the French sixty years before—a country one could defeat and overrun but never subdue. Severity, of course, is absolutely essential in administering a hostile country, but it is sound policy to conciliate as well, so long as conciliation is not resorted to under circumstances which

A discriminating use of methods of conciliation is wise.

¹ Busch, *Bismarck*, Vol. II, p. 249.

² Hozier, *Franco-Prussian War*, Vol. II, p. 42.

would make it appear to be weakness or vacillation. The larger, heroic issues are seldom the actual springs of action in human affairs. A peasantry will usually be disposed to acquiesce in a rule which, if severe, is just and not tyrannical, and it will be ready to turn a deaf ear to the call of patriotism if it can obtain its bread and butter and ordinary creature comforts; else those nations which have, at some time or other, felt the hot breath of invasion and conquest—that is, nearly all the nations of Europe—would to-day be a seething mass of unrest. A wise commander will always be glad to gain the good will of the hostile population, or at least their passive acquiescence in his rule. When the Duke of Wellington invaded southwestern France in 1814, he sent back his Spanish allies to Spain because they had pillaged the French inhabitants. “What has occurred in the last six years in the Peninsula,” he said in his despatch, “should be an example to all military men on this point [as to the danger of setting the inhabitants against the invader], and should induce them to take especial care to endeavour to conciliate the country which is the seat of war.”¹ The Russians failed in this respect in Korea in 1904; they made no effort to gain the good will of the Koreans, who suffered a good deal from the truculence and cruelty of some of the Russian troops—Buriaks, Calmucks, and Tartars. The result was that the people turned to the Japanese—their former traditional enemies—as to protectors and gave them much valuable help in the northern advance.²

In Chapter III I have shown that conventional war law allows combatant privileges to the population of an *unoccupied* country which rises *en masse* at the approach of the invader. It is silent as to risings in occupied countries, and though certain nations would claim similar privileges for *levées-en-masse* in the latter case also, the silence of the *Règlement* would almost certainly be construed by the majority of the powers (despite the *von* proposed by Great Britain in 1899)³ as warranting the extremest punishment being inflicted on a population which attempt, unsuccessfully, to oust an enemy

Importance of defining occupation is due to beligerent disqualification of inhabitants of occupied country.

¹ Creasy, *First Platform of International Law*, p. 490.

² T. Cowen, *Russo-Japanese War*, p. 222.

³ *Vide supra*, pp. 9, 10; also p. 54.

occupant. The nations which claim the widest liberty for national defence would hardly allow that any chance individual has the right to rise in arms against the invaders, whose authority he had accepted in the first instance, as soon as it pleases or suits him to do so: and most nations would refuse belligerent rights even to a "massed rising" in an occupied territory.

The
nature of
occupa-
tion.

It is this difficulty about recognising the belligerent status of civil populations which rise in arms, that makes it so immensely important that the nature of occupation should be defined very precisely. What does "occupation" mean? The answers have been many and various—none of them altogether satisfactory and a few having a family resemblance to Captain Jack Bunsby's replies to Captain Cuttle—they might mean anything under the sun. The Brussels Conference devoted days to discussing the matter. The delegates were divided into two camps on this question, as on the question of belligerent qualification; the view of each of the parties is indicated in the following extract from the *résumé* of the discussion, as given in the Blue Book:—

The
Brussels
debate.

The German view is as follows: Occupation is not altogether of the same character as a blockade, which is effective only when it is practically carried out. It does not always manifest itself by visible signs. If occupation is said to exist only where the military power is visible, insurrections are provoked, and the inhabitants suffer in consequence. A town left without troops must still be considered occupied, and any rising would be severely punished. Generally speaking the occupying power is established as soon as the population is disarmed, or even when the country is traversed by flying columns. It being impossible to occupy bodily each and every point of a province, the expression "territory" must, as regards occupation, be interpreted liberally.

It is claimed for this view that it is really to the benefit of the invaded, as it checks temptations to insurrection which gives rise to the infliction of severe punishment.

The other view, which received the support of nearly all the other delegates, is to the following effect:—

Greater power must not be accorded to the invader than he actually possesses. Occupation is strictly analogous to blockade, and can only be exercised where it is effective. The occupier must always be in sufficient strength to repress an outbreak. He proves his occupation by this act. An army establishes its occupation

when its position and lines of communication are secured by other corps. If a territory frees itself from the exercise of this authority it ceases to be occupied. Occupation cannot be presumptive.¹

The view which commanded the majority of votes was that occupation must have some "substance" in it, that it cannot be presumed or "fictitious"—a "paper occupation"—and that while a commander is not required to picket the whole country and to garrison every hamlet, in order to establish his occupation, he must not proclaim as occupied a territory in which his troops have not, and could not, set foot. As defined in Article XLII, two distinct ideas underlie the juristic meaning of occupation: (a) the invader must have established his authority; and (b) he must be in a position to enforce it. One sees the latter idea in operation in the refusal of the rights of an occupant to an invader whose possession is disputed; the former, in the refusal of such rights to one who claims them, on *first* entering a hostile province, in virtue of a proclamation previously issued there by his agents. The two ideas are combined to limit the rights of a belligerent in respect to a hostile province through which he has swept hurriedly on his way to a more distant province, but in which he has neither established any kind of military government nor left any force on the spot or within reach to maintain his power. The Germans interpreted occupation very liberally in 1870-1. Mr. Sutherland Edwards passed through huge areas of theoretically occupied country, from St. Germain to Louviers, from Rouen to Dieppe, from Dieppe to Neufchâtel, without seeing a Prussian soldier.² The whole principle of the Germans' occupation was really "bluff"; they traded on the fact that "an army enjoying the prestige conferred by a long and all but uninterrupted series of victories, may proclaim its dominion over an extent of country out of all proportion to what it could really hold in face of determined resistance."³ Their occupying force was composed largely of "men in buckram." The objection to such a system of occupation is that the inhabitants are tempted to try to throw off the yoke of the foreign master, who must employ

The German system of "theoretical" occupation in 1870-1.

¹ Brussels B.B. p. 160.

² *The Germans in France*, p. 254.

³ *Ibid.* p. 254.

drastically severe methods of reprisals to substantiate the authority which he claims. It is to be hoped that war has seen the last of occupations of this kind. It is condemned not only by equity and war law (as expressed in Article XLII) but by the expert opinion of all the civilised nations. "The principle," says Hall, "that occupation, in order to confer rights, must be effective, when once stated, is too plainly in accordance with common sense, and too strictly follows the law already established in the analogous case of blockade, to remain unfruitful."¹ But it would be unwise to interpret occupation too stringently as against the rights of the occupant. There is occupation so long as the occupant does actually exercise authority, to the exclusion of the legal government, in the area in question; and this he may do by means of flying columns quite as well as by maintaining garrisons. He must *police* the country and have it firmly under control. To establish an effective blockade there need not be a line of cruisers drawn across the mouth of a harbour, but there must be some force within striking distance, so as to make it difficult for any vessel to "run the blockade" and gain entrance; and the same principle governs occupation. The whole population need not necessarily have been disarmed, nor is it essential that the occupation shall have been made known by proclamations (though it is obviously desirable that the inhabitants should be notified in this or some other way of their liabilities). "The presence of an invading army in a district is, of itself, without any special warning to the inhabitants, a sufficient proclamation that the martial law of that army is in force in that district."² "If the invading army," says Professor Pillet, "has secured a success sufficient to oblige the enemy to retire, all the territory which the latter leaves free is susceptible of occupation and it is considered as occupied as soon as the invader, by some positive act, has manifested his intention of exercising his authority there."³ Occupation is simply a state of fact (as the French Official *Manuel* says, p. 93) and needs no formal announcement to give it legal existence. If the occupying

Occupation is analogous to blockade.

¹ *International Law*, p. 483.

² Holland, *Official Laws and Customs of War*, p. 6.

³ Pillet, *op. cit.* p. 240.

belligerent is displaced by the return of the national forces, or if he retires definitely, of his own accord, the occupation ceases, and in such a case, as General de Voigts-Rhetz pointed out at Brussels,¹ the population cannot be subjected to penalties if they rise; the country is not "occupied." But if they rise while the occupation lasts, or even while the national troops are trying to displace the occupying forces, they do so at their peril. They have not the rights of combatants under the Conventions relating to war.

The Government of an occupying army is essentially provisional. So long as the war continues, occupation cannot be regarded as conquest. It may happen that a belligerent has occupied a territory which he intends to keep, by right of conquest, after the war has closed, and that the course of the hostilities shows that he will, with all human certainty, be in a position to wring the cession from his adversary. It was so in the case of Alsace-Lorraine in 1870-1 and of the South African Republic in 1899-1902; and in the case of the Russian occupation of Bulgaria in 1877-8, the invader acted upon the assumption that the country would never be restored to Turkey, under the old conditions.² In such cases the occupant "still establishes an administration which will exercise various rights of sovereignty in the name of the conqueror. . . . But his position is based, in this case also, solely on the fact of possession; it is bounded, as M. Geffeken says, within the limits of the power which he has to exclude all action by others as regards the object of his possession. However intense may be the desire to retain the occupied territory, with whatever certainty the occupant may count on forcing his vanquished enemy to agree to the cession by a treaty of peace, he has, up to the conclusion of peace or the annihilation of his adversary, no rights other than those which follow from his possession."³ The rule thus stated by the French and German jurists is founded on utility and justice. "While there is life there is hope," and so long as a struggle is maintained, however hopeless it may appear, fate

¹ Brussels B.B. p. 238.

² De Martens, *La Paix et la Guerre*, p. 279.

³ Bontils, *op. cit.* sec. 1158, the latter part being quoted by this jurist from Loening, *L'Administration de l'Alsace-Lorraine pendant la Guerre de 1870-1*, R.D.I. IV, p. 634.

and fortune may reverse the balance and displace the occupation. And allegiance to a sovereign is a weighty obligation, of far-reaching consequences, which requires some national expression of concurrence or acquiescence—an express agreement or a tacit but complete renunciation of the struggle—to bring it into being. In 1870 Alsace and Lorraine were at once placed definitely under a German administration.¹ Germany meant to keep them, but she made no pretension to absolute sovereignty over them until France ceded the two great Rhine provinces. She sought to win over the hearts of the people and reminded them of a day when their forefathers were Germans of the Germans :

Alsace
and
Lorraine
not
regarded
as con-
quered
until end
of war.

In Alsace over the Rhine
There lives a brother of mine ;
It grieves my heart to say
He hath forgot the day
We were one land and line.

But she allowed the people to vote for the French National Assembly in 1871. "Although Germany had the intention of annexing these provinces, although it was furthermore certain at the time when the elections took place that nothing could prevent the realisation of this intention, the inhabitants were nevertheless permitted to send their representatives for the last time to a French Assembly. The German authorities took it upon themselves simply to forbid public meetings—a measure quite justified by the circumstances."² With the correct attitude of the Germans on this matter the action of the Boer occupants of Cape Colony in 1899, and of the British occupants of the Orange Free State in 1900, compares very disadvantageously. The Proclamation issued by President Steyn on October 14, 1899, and amplified by proclamations from Wessels and other Free State Commandants, practically annexed British territory in Cape Colony, and "wavering loyalists were impelled to take up arms by being told that to do so was their obligation as Transvaal or Free State burghers."³ On the 24th May, 1900, the Free State was formally annexed. On the 1st June, a Proclamation was issued which warned the burghers that

Irregular
procedure
of the
Boers in;
1899 ;

and the
British in
1900.

¹ Edwards, *Germans in France*, p. 45.

² Pillet, *op. cit.* p. 257.

³ *Times History*, Vol. II, p. 273.

"inasmuch as the Orange River Colony, formerly known as the Orange Free State, is now British territory . . . all inhabitants thereof, who, after fourteen days from the date of this Proclamation, may be found in arms against Her Majesty within the said Colony, will be liable to be dealt with as rebels and to suffer in person and property accordingly."¹

It is a matter of history that the war continued for just two years after the date of the issue of this Proclamation and that during those two years the British forces suffered considerable reverses in the Free State as well as in the Transvaal. There was no *debellatio* on 1st June, 1900; very far from it. And the Free State burghers could in no circumstances be considered as other than the forces of an independent Sovereign State; no claims to suzerainty over the Free State was ever advanced by Great Britain. The fact is, as General den Beer Portugael pointed out in the *Revue des Deux Mondes*, that the position taken up in the Proclamation of 1st June, 1900, was hopelessly bad in law, and that the annexation was not worth the paper it was written on.² Not only foreign jurists but British statesmen like Sir William Harcourt and Mr. James Bryce—names of great weight in International Law and Constitutional History—condemned the Proclamation. Mr. Bryce referred to it in the House of Commons as

A monstrous Proclamation, a Proclamation absolutely opposed to the first principles of International Law, a Proclamation based upon a paper annexation made seven days before, which purported to treat the inhabitants of the two Republics³ as rebels—rebels, forsooth, on the basis of this paper annexation.⁴

Indeed one has to go back to a bad precedent of the Secession War to find a similar claim on the part of a commander to the rights of sovereignty in an occupied country. When Pope took command of the "Army of Virginia" (which was merged, after the Second Manassas, in the more famous "Army of the Potomac") he issued some extraordinary general orders which

¹ *Proclamations of F.M. Lord Roberts* (Cd. 426), p. 8.

² *Revue des Deux Mondes*, 1st November, 1901, p. 38 ff.

³ This was a mistake of Mr. Bryce's, I think: the Transvaal was not annexed until 1st September, 1900; but his words stand, of course, as regards the Free State.

⁴ *Wyman's Army Debates*, Session 1902, Vol. I, p. 190.

made even the partial Yankees laugh at his "'Ercles vein," and among these orders was the notorious

Pope's
notorious
General
Order
No. 11.

General Order No. 11.

H.Q., Army of Virginia,

Washington, July 26, 1862.

Commanders of army corps, divisions, brigades, and detached commands will proceed immediately to arrest all disloyal male citizens within their lines or within their reach in rear of their respective stations.

Such as are willing to take the oath of allegiance to the U.S., and will furnish sufficient security for its observation, shall be permitted to remain at their homes and pursue in good faith their accustomed avocations. Those who refuse shall be conducted south beyond the extreme pickets of this army, and be notified that if found again anywhere within our lines, or at any point in rear, they will be considered spies, and subjected to the extreme rigour of military law.

If any person, having taken the oath of allegiance as above specified, be found to have violated it, he shall be shot, and his property seized and applied to the public use.

All communication with any person whatever living within the lines of the enemy is positively prohibited, except through the military authorities and in the manner specified by military law; and any person concerned in writing or in carrying letters or messages in any other way will be considered and treated as a spy within the lines of the U.S. Army.

By command of Maj. Gen. Pope.

Geo. D. Ruggles,

Colonel, A. A. G., and Chief of Staff.¹

There is here as clear an attempt, as in the case of the British Proclamation of 1st June, 1900, to twist occupation into legal dominion, contrary to the laws and usages of war; the annexation in the later case being an obscuring factor corresponding to the constitutional right (not advanced at other times) of the Union Government in the earlier case. With the last paragraph of the order no great fault can be found; but the principle laid down in the first three paragraphs is one which every writer who has touched on the incident has condemned,² and which the best military opinion, both Union and Secessionist, characterised at the time as needless cruelty. One of

¹ Longstreet, *From Manassas to Appomattox*, p. 154.

² See, for instance, Wood and Edmunds, *History of the War in the United States*, p. 96, quoting from Ropes, *Army under Pope*.

McClellan's letters alludes in the strongest terms of denunciation to the "infamous orders" of "Mr. John Pope," as he calls his brother general.¹ Lee denounced the order as one authorising "atrocities" against defenceless citizens, and both he and Longstreet display a very bitter spirit against Pope in their letters and writings.² But events moved so rapidly that the Washington authorities had no occasion to consider whether they should approve of his action or not. "This new general," Stonewall Jackson was told, "claims your attention." "And, please God, he shall have it," said Jackson. He did; and a few weeks after the Proclamation was issued Jackson had slipped away from Clark's Mountain, passed through Thoroughfare Gap, cut Pope's communications at Manassas Junction, called up Lee and Longstreet to his aid, and driven the braggart Pope, crushed and humbled, from the field of the Second Manassas, to cover under the Washington defences. The territory which Pope had claimed to govern as a sovereign ruler was again in Confederate hands, and Pope and his policy passed, most conspicuously unwept, out of history. His fall came with such dramatic suddenness that one likes to see in it a "judgment" for his tyrannous Proclamation; and this may not be such a fanciful conceit after all, for the same qualities that make a commander unsound in his strategy will usually make him unsound in his International Law too. The great defeat of the Second Manassas may quite well have been the punishment of bad war law not less than of bad generalship.

If the inhabitants of an occupied territory do not owe allegiance to the occupying belligerent, they do owe him the duty of quiescence and of abstention from every action which might endanger his safety or success. They are subject to his martial law regulations, and they may be judged guilty of "war treason" under certain circumstances. "War treason" (Kriegsverrath) is distinguished from rebellion (which is the

¹ *McClellan's Own Story*, pp. 463-4.

² Captain R. E. Lee's *Lee*, p. 77; White's *Lee*, p. 173; Longstreet, *op cit.* pp. 155-6. Lee wrote to Halleck, in relation to Pope's order, in such an unusually (for Lee) unguarded way that Halleck replied—"As these letters are couched in language exceedingly insulting to the Government of the United States, I must respectfully decline to receive them. They are returned herewith." (Draper, *op. cit.* Vol. II, p. 432.)

actual taking up of arms), and is thus defined in the German Manual:—

The act of damaging or imperilling the enemy's power by deceit, or by the transmission of messages to the national army on the subject of the position, movements, plans, etc., of the occupant, irrespectively of whether the means by which the sender has come into possession of the information be legitimate or illegitimate (*e.g.*, by espionage).¹

The French jurist, Professor Bonfils, points out that it is quite immaterial what the motives of the war-traitor are—whether patriotic and noble or base and mercenary—and how he has come by the information he conveys; for these things do not affect the danger to the invading army. So far as touches the latter, it is an act of perfidy when a person who has been respected as a non-combatant abuses his position to render secret aid to his national forces.²

The offence of war treason is recognised by the French Official *Manuel à l'Usage des Officiers* (pp. 35–6) and by the *American Instructions* (Arts. 90–92). Some jurists have quarrelled with the term and the principle on the ground that, though the inhabitant owes a duty of obedience to the occupant, “this duty is in no way accompanied by the feeling of affection and brotherhood, the violation of which gives the crime of treason its infamous character”;³ or that “the duty owed in return for the maintenance of order will not extend so far” as to justify a breach of it being considered morally blamable or treasonable.⁴ Such objections appear to me to be beside the point. In an occupied country a certain law runs, and that law receives its sanction from the occupying belligerent. He may keep the former Government's laws in force, but still they are, during occupation, the laws of the new ruler, who is alone able to enforce them, and who might abrogate them if he chose. We have got a long distance to-day from the stage when treason implied infidelity to a personal sovereign, as it did when feudalism was a force in social economics and long afterwards. To-day treason means a conspiracy against the *established*

¹ *Kriegsbrauch im Landkriege*, p. 50.

² Bonfils, *op. cit.* sec. 1154.

³ Pillet, *op. cit.* p. 208.

⁴ Westlake, *International Law*, Part II, p. 90.

authority in a State. Now the established authority in an occupied territory is the *de facto* ruler, the occupant. If one likes the phrase he is the "war ruler," and as it is "treason" to conspire against the ordinary ruler, it is "war treason" to conspire against the "war ruler." No jurist would deny the occupant's right to deal summarily with an individual who, having been treated as a non-combatant, abused his immunity by sniping the enemy's foragers or stragglers; and the damage done by an individual sniper would probably be infinitely less than that done by sending messages to the national army. Either act is clearly one which the occupant must, for his security's sake, punish rigorously: not because either is morally wrong, but because it is dangerous. But, any way, if one compares the two acts from the view-point of morality, less moral blame would appear to attach to the man who takes rifle in hand than to him who pretends to accept the occupant's authority while all the time he is sending secret messages to the other commander. Although no mention of war treason is made in the British Official Manual, as it is in the French, German, and American Manuals, the offence is referred to in the Circular Memorandum issued by Lord Kitchener on 2nd May, 1900, relative to martial law in the Orange Free State. The reference is as follows:—

There may be war treason as against an occupant.

In cases of *treachery* by persons resident in the country, who, having signed a declaration of neutrality, either hold communication with the enemy, assist him with supplies and information, or wilfully infringe the laws or customs of war, prompt trial should take place on the spot where the offence was committed and the witnesses are available.¹

As I shall show later on, the signing of a declaration of neutrality does not increase the obligations laid upon the inhabitants of an occupied territory; those obligations are the same whether they sign or not. Nothing but a voluntary oath of allegiance can change their status while the war continues. One has, therefore, in the above quotation, an official recognition on the part of the British authorities of the offence of war treason.

¹ *Papers relative to Martial Law in South Africa* (Cd. 981), p. 291.

The obligations of the inhabitants of an occupied territory.

I have spoken, in connection with Article XXIII, last paragraph, of the services which the inhabitants of an invaded territory can be called upon to render to the invader,¹ and an occupant's right is as extensive in this respect as an invader's. Reams upon reams have been written as to the obligations of the population of an occupied province. I prefer to give the *ipsa verba* of the orders and proclamations which have been actually issued by occupying belligerents, than to attempt to draw up any general code of rules and regulations by collating and selecting from the historical documents bearing on the matter. In a case of this kind I believe most people find first-hand evidence both more interesting and more easy to assimilate and remember than a synopsis or *excerpta* compiled therefrom, however skilfully done.

German Proclamation of August, 1870.

Soon after occupying French territory in 1870, the Crown Prince of Prussia issued the following Proclamation.

1. Military jurisdiction is hereby established. It will be applied, throughout the extent of French territory occupied by the German troops, to every case of an attempt to endanger the security of these troops, to cause them damage or to assist the enemy. The military jurisdiction will be considered in force and proclaimed for the whole area of a "canton" immediately a proclamation has been posted up in one of the localities of the same.

2. All persons not forming part of the French Army and not proving their quality as soldiers by outward marks, and who

(a) serve the enemy as spies;

(b) mislead the German troops when charged with serving them as guides;

(c) kill, wound, or pillage persons belonging to the German armies or accompanying them;

(d) destroy bridges or canals, damage telegraph lines or railways, render roads impassable, set fire to munitions, provisions or quarters;

(e) take up arms against the German troops, will be punished with death.

In each case, the responsible officer will institute a council of war, with authority to try the matter and give judgment. The councils of war cannot condemn to any other punishment than the punishment of death. Their sentences will be executed immediately.

3. The *communes* to which the culprits belong, as well as those

¹ *Vide supra*, pp. 150-2.

whose territory has been the scene of the offence, will be fined in each case in a sum equal to the annual amount of their taxes.¹

With this Proclamation must be read the proclamation issued upon the occupation of certain French towns. When Corny was occupied on 13th August, 1870, it was ordered that—

Orders issued at the occupation of Corny ;

1. All arms should be given up at the Mairie within two hours, and any inhabitants concealing the same should be treated "with all the severity of military law."

2. No groups to be formed in streets.

3. Shutters to be kept open, blinds drawn up.

4. Inhabitants to supply troops marching through the town with water.

5. No impediment to be offered to the advance of the troops. "Any one offering impediments of any kind will be at once taken and shot."²

When Strassburg was occupied, the Prussian Commandant issued the following order :—

and at Strassburg.

The state of siege still continues. Crimes and offences will be punished by martial law. All weapons are immediately to be given up. All newspapers and publications are forbidden till further orders. Public houses to be closed at 9 p.m., after that hour every citizen must carry a lantern. The municipal authorities have to provide quarters, without food, for all good men.³

Here, it will be seen all newspapers were suppressed for the time at least. In the Secession War one finds the Federal occupants, not indeed suppressing the newspapers altogether as at Strassburg, but restricting the right of publication to certain approved papers and laying heavy responsibilities on the editor and proprietors for any "libellous publication, mischievous matter, premature news, exaggerated statement, or any comments whatever upon the acts of the constituted authorities—even if copied from other papers."⁴ To the good American the freedom of the Press is an article of belief: he is quite ready to attribute to newspaper editors a divine right which his forefathers found intolerable in kings. The action of the Federal

Control of the Press in the Secession War.

¹ Hozier, *Franco-Prussian War*, Vol. I, p. 346; Hall, *International Law*, pp. 472-3, note.

² Hozier, *op. cit.* Vol. I, p. 350. An identical proclamation was issued elsewhere—e.g. at Pont-à-Mousson, see Edwards, *op. cit.* p. 74.

³ Hozier, *op. cit.* Vol. II, p. 69.

⁴ Sherman, *Memoirs*, Vol. II, p. 234.

authorities is therefore very strong evidence (were any needed) of the existence of a war right which warrants the control of the Press in an occupied territory.

Proclamation at the occupation of Metz.

General von Kummer, provisional German Commandant of Metz, issued the following Proclamation when he entered the city, 30th October 1870 :—

If I encounter disobedience or resistance, I shall act with all severity and according to the laws of war. Whoever shall place in danger the German troops, or shall cause prejudice by perfidy, will be brought before a council of war; whoever shall act as a spy to the French troops, or shall lodge or give them assistance; whoever shows the road to the French soldiers voluntarily; whoever shall kill or wound the German troops or the persons belonging to their suite; whoever shall destroy the canals, railways, or telegraph wires; whoever shall render the roads impracticable; whoever shall burn munitions and provisions of war; and, lastly, whoever shall take up arms against the German troops, will be punished by death. It is also declared that (1) all houses in which or from out of which anyone commits acts of hostilities towards the German troops will be used as barracks; (2) no more than ten persons will be allowed to assemble in the streets or public places; (3) the inhabitants must deliver up all arms by 4 o'clock on Monday, the 31st of October, at the Palais, rue de la Prinerie; (4) all windows are to be lighted up during the night in case of alarm.¹

Beyer's address to the people of Alsace.

To anything approaching popular resistance the Germans showed themselves especially pitiless. General Beyer's address to the Alsatians represents the attitude adopted by the occupying commanders on this question; he said—

The armed fight with the armed in honest, open conflict. But we will spare the unarmed civilians, the inhabitants of the towns and villages. Maintaining severe discipline, we expect—nay, I demand it most rigorously—that the inhabitants of this country shall refrain from cover or secret hostility.²

Proclamation at St. Quentin.

And when St. Quentin was occupied in October, 1870, the following notice was placarded on the walls :—

Very Important Notice.—The German military authority informs the public that should a shot be fired on a single German soldier, six inhabitants will be shot.³

The town of Ablis was burnt to the ground because the towns-

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 124.

² *Op. cit.* Vol. I, p. 345.

³ Cassell's *History*, Vol. I, p. 395.

people arose and attacked the occupying German garrison in the same month.¹ But one could give hundreds of instances of this kind, and if the Germans laid an unduly heavy hand on the towns and districts in which they met with unorganised civil resistance, they were within their war rights in taking up the position that such resistance merited reprisals sufficiently severe to be deterrent.

The inhabitants of Bulgaria and other Turkish provinces were notified of their duties toward the occupying Russian forces in the following Proclamation, issued by the Russian Commander-in-Chief on 1st June, 1877 :—

Russian
Proclama-
tion of
June,
1877.

The inhabitants of the provinces occupied by the Russian troops and all individuals not belonging to the army, will be judged for the crimes or delicts which they commit by the ordinary criminal tribunal of the district, except as regards the crimes enumerated below, for which they will be tried by councils of war and punished as prescribed in the Russian laws applicable in war, viz. :—

(1) Rebellion, insubordination, conspiracies against the Russian Commander-in-Chief or against the authorities instituted by him for the administration of the country.

(2) Espionage, *i.e.*, the communication to the enemy of information prejudicial to the Russian army.

(3) The destruction or damaging of wells, water courses, telegraphs, railways, bridges, canals, and other means of communication.

(4) The burning or destruction in other ways of warlike *matériel* or articles constituting the means of defence or of subsistence of the troops.

(5) Murder, robbery, brigandage, pillage, arson, conversion of goods, and other crimes in all cases in which the gravity of the circumstances makes it necessary to have recourse to the military tribunals for the security of the army and the public order.

Under these conditions, any matter may be removed from the cognisance of the ordinary criminal tribunals and submitted to a council of war, by order of the Commander-in-Chief or of persons specially authorised by him.

Moreover, the councils of war have cognisance of all crimes committed by the inhabitants of occupied provinces in concert with military persons or individuals belonging to the army; and the same applies to women who have been proved to be accomplices in criminal acts committed by persons liable to be tried by councils of war.²

¹ Cassell's *History*, Vol. I, p. 369.

² De Martens, *La Paix et La Guerre*, pp. 280-1.

Boer Proclamations in Natal and Cape Colony. The following paragraph appears in all Proclamations issued by the Boer commandants in the territory of Natal or Cape Colony which they occupied in the winter of 1899-1900 :—

All persons who do not constitute a portion of the British army and who

- (a) serve the enemy as spies ;
- (b) cause the burghers and men of the South African Republic and Orange Free State to lose their way when acting as guides ;
- (c) kill, murder, or rob persons belonging to one of the Republics, or forming part of their following or train ;
- (d) destroy bridges or damage telegraph lines, heliographic apparatus, or railways, or in any way cause damage to parts or portions of the same, whereby the Republics may be hindered, or their people or property damaged, or even they who in any way endeavour to repair or make good the damage done by the Republican forces to property or apparatus, or who set fire to the ammunition, war supplies, quarters or camps of the Republican forces, or in any way damage them ;
- (e) take up arms against the forces of one of the said Republics, shall at the discretion of a Council of War be punished with death or imprisonment not exceeding fifteen years.¹

British Martial Law regulations in the Anglo-Boer War.

A very full and instructive body of martial law regulations for Cape Colony was drawn up by the British Military authorities in 1901 and supplemented in 1902. The proclaimed districts in the Colony in which these regulations were enforced were, for all practical purposes, hostile—and usually bitterly hostile—territory, and the British troops were really in the position of an occupying enemy force. The first circular issued in the Colony on the subject of martial law was made applicable to the Free State by an Army Order of 2nd May, 1900.² I cannot find any Army Order which applied the later regulations to the Boer Republics, but they, or regulations of a similar kind, must have been in force in those countries, as will be seen from the list of offences and punishments given in the Blue Books relating to martial law.³ The regulations I refer to covered the following points :—

¹ *Times History*, Vol. II, pp. 273-5.

² *Papers relative to Martial Law* (Cd. 981), p. 291.

³ See Blue Books (already quoted several times) on *Martial Law*, Cd. 981 (1902), pp. 121 ff. and (Cd. 1423, 1903), pp. 77 ff.

MARTIAL LAW REGULATIONS. (Issued May, 1901, finally amended May, 1902).

1. Arms, ammunition and explosives to be reported to District Commandant and permit obtained for same. Persons *knowing of* other persons being in possession of arms, etc., were liable to punishment for not informing the military authorities.

2. All travelling, with certain few exceptions (*e.g.*, to market or church), forbidden unless traveller could produce a permit.

3. In districts in which enemy's presence was reported, the names of all householders and residents were to be entered on a pass, which was to be attested by an agent of the District Commandant, and posted conspicuously on each house or farmstead.

4. Traders' and hawkers' licenses suspended; commercial travellers to move only on a special permit.

5. All parcels in transit to be liable to examination; contraband goods to be seized and consignor or consignee punished. The carrying of private parcels in any way other than in Post office mail bags, prohibited.

6. All letters, telegrams, etc., liable to be censored.

7. Meetings of more than 6 persons forbidden, except

(a) with a permit;

(b) religious services in churches;

(c) meetings of Divisional Councils or Municipal Councils;

(d) meetings of persons residing in one house.

8. Seditious language forbidden.

9. Spreading of alarmist reports forbidden.

10. Circulation of newspapers, pamphlets or periodicals likely to promote sedition, disaffection or bad feeling prohibited; and persons found in possession of such papers to be punished.

11. Overcharging for goods forbidden.

12. Persons guilty of following offences to be liable to death or less punishment:—

(1) being actively in arms against His Majesty;

(2) directly inciting others to take up arms against His Majesty;

(3) actively aiding or assisting the enemy;

(4) committing any overt act by which the safety of His Majesty's Forces or subjects is endangered.

13. No unauthorised person to wear uniform or any clothes resembling uniform.

14. All signalling and exposing of coloured lights forbidden.¹

¹ Two Boers were sentenced to 10 years' penal servitude by a military court (5 years remitted by Confirming Officer) for "Conspiring to communicate with the enemy by signal and being in possession of signalling apparatus." (*Papers relative to Martial Law*, Cd. 981, p. 160.)

15. Keepers of hotels and boarding-houses to be answerable for conduct of residents.

16. Sale of intoxicating liquor restricted.

17. Every person to remain in his or her house from 10 p.m. to 5.30 a.m. Lights to be out from 10.30 p.m. to 5.0 a.m., except in cases of sickness or emergency (to be reported).

18. Regulations as to requisitioning laid down.

19. Military animals or stores not to be injured or removed.

20. All horses, mules, donkeys, oxen, vehicles and equipment to be brought in to the Commandant on his demand.

No person to be in possession of a cycle or riding horse (or mare) except with a permit.

21. Obstructing or impeding officers or other persons carrying out orders of Commandant prohibited.

22. Sketching or photographing defence-works, or trespassing thereon, forbidden.

23. Defacing of martial law notices forbidden.

24. Following acts are offences :—

(1) disobeying an order given by an officer administering martial law ;

(2) conduct, etc., to the prejudice of good order or the public safety ;

(3) acts or conduct calculated to hamper the movements of H.M.'s Forces.

In a later edition of the martial law regulations, the following additions were made to the above list of offences :—

25. Persons failing to report the presence of the enemy, or giving the enemy information, money, food, etc., to be punished.

26. Save under a permit, importation into a proclaimed district, or removal therefrom, of the following stores prohibited :—

(a) Foodstuffs of any kind for men or animals.

(b) Tobacco in any form.

(c) Blankets, rugs and goods of a similar nature.

(d) Harness, saddlery and leather.

(e) Clothing for men and boys and woollen underclothing of any kind.

(f) Boots and shoes and veldschoens.

(g) Horseshoes and nails, and implements for shoeing.

(h) Bolt-clippers and tools for cutting wire.

(j) Cycles and automobiles.

(k) Arms, ammunition, dynamite or other explosives.

(m) Field-glasses and telescopes.

(The above are "prohibited goods," corresponding to "conditional contraband" in sea war).

On farms or homesteads outside the military limits of defended

towns or villages, foodstuffs to be allowed only in sufficient quantities for one, two, or three weeks' supply, as the Administrator (as the Commandant was afterwards called) might decide; and persons having more than such quantities on hand to be punished.

27. No person to have in his possession any horse or mule without a "protection certificate."

28. No compensation to be paid for any animals, supplies or stores which fall into the enemy's hands owing to failure of claimant to remove them into safe keeping, nor for animals, etc., which the military authorities were willing to purchase.

29. Animals, stores, etc., left behind by H.M.'s troops or the enemy to be brought into nearest defended town or village by person on whose property they were left.

30. No person to have a cycle or automobile without a permit.

31. Persons in custody attempting or conspiring to escape to be punished—corporal punishment, not exceeding 25 lashes, might be inflicted.

32. False or fraudulent statements in any report or document, or forging or tampering with passes, permits, etc., to be punished.

33. Perjury to be punished.

It is interesting to note that there are records of *women* being punished for contravening certain of the above regulations. Thus Mrs. Anna S. Low was sentenced on 2nd April, 1901, by a military court at Bloemfontein to 6 months' imprisonment with hard labour for "aiding and abetting the enemy"; and Miss Peters was fined £75 on 6th May, 1901, for "giving information to the enemy."¹ As the danger to the occupant is the same, the sex of the culprit does not affect the liability to punishment.

Women
punished
under
Martial
Law.

The right of an army, says Professor Ariga, to promulgate martial law and to establish military tribunals applies not only to an army operating in a hostile country, but also to one operating in a neutral or an allied country which circumstances have made the theatre of war: for two reasons. First, an army must be in a position to safeguard itself by having suitable laws for that end in force: secondly, even if the existing laws are sufficient, the local tribunals may not wish, or may be unable, to apply them for the protection of the occupying troops. It was for this reason that Japan established and enforced martial law in Manchuria (a province of a neutral country, China) and in Korea (an allied country).²

In certain
circum-
stances
Martial
Law may
be applied
to a
neutral or
allied
country.

¹ *Papers relative to Martial Law*, Cd. 981, p. 205. ² Ariga, *op. cit.* p. 378.

No uniform code of Martial Law regulations used in the war of 1904-5.

Professor Ariga's view.

No uniform code of martial law regulations was used by the Japanese armies. The Headquarter Staff of the army of Manchuria considered it undesirable to formulate any penal regulations, for two reasons: one a political reason, because, China being a neutral Power, it was thought that her susceptibilities might be wounded by the promulgation of a rigorous law (as martial law must be) affecting her subjects; the other a legal reason—that if there were a body of fixed regulations they would have to be applied strictly and the punishment would not always be proportionate to the offence. Professor Ariga, in whose absence this ruling of the Headquarter Staff was given, does not agree with it. He holds that a general universally applicable *Règlement* should have been drawn up, and that for three cogent reasons:—

(1) It is contrary to the principles of repressive legislation not to make known the acts which are, or are not, punishable.

(2) The end of martial law is repression; the threat of punishment is more valuable than the punishment itself, and therefore notification of the laws which apply is of great importance.

(3) Unlike the ordinary penal law, martial law requires no fixed and definitive *formulae*; it uses general clauses to a much greater extent.

The result of the ruling given by the Staff was that there were a whole sheaf of martial law regulations in force. "Each army, each garrison, each post commandant, each commission of military administration had its own martial law and its own special regulations thereunder." At Port Arthur, there were in existence the martial law of the garrison of Liao-Tung, of the naval station of Port Arthur, of the fortress of Port Arthur, and of the commission of military administration; it was consequently a work of art for the gendarmes to decide which law was to be applied in any case. There is little doubt, I think, that Professor Ariga makes out a case for his view (which had the support of all the International Law advisers in the field) as against the view of the Headquarter Staff.¹

The following is an extract from the martial law regulations which were in force in the armies in Manchuria and Korea, and in certain garrisons and military commissions.²

Extract from the various Martial Law regu-

¹ Ariga, *op. cit.*, pp. 379-381.

² *Ibid.*, pp. 381-5.

Substance of Martial Law.

All the laws and regulations relating to the punishments for acts detrimental to the Japanese Army in Korea and Manchuria cannot be given here. All that can be done is to indicate the principal acts for which punishment can be awarded.

lations
issued
by the
Japanese
armies.

1. To oppose our land and sea forces, military authorities or persons attached to our army or navy.
2. To be attached to the enemy and act hostilely against our army without being clothed in a regular uniform.
3. To act as a spy, to conceal a spy, or assist his flight.
4. To communicate to the enemy the movements of our land and sea forces.
5. To guide our army badly.
6. To spread false news.
7. To make a noise or utter outcries of a nature to disturb our land and sea forces.
8. To publish placards detrimental to our army.
9. To disturb public order by meetings, assemblies, publication of newspapers, and reviews, posting up placards and other similar means.
10. To aid or facilitate the movements of the enemy.
11. To guide the enemy.
12. To guide or assist knowingly the flight of the enemy.
13. To deliver up prisoners of war, hide them and assist their escape.
14. To destroy, burn or steal military stores, military buildings such as *depôts*, barracks, arsenals, military stores, etc.
15. To destroy or spoil military stores, arms and other articles left on the field of battle by our army or the enemy.
16. To destroy or burn the various means of military communication, such as telegraph wires, railways, bridges and highways, canals, etc., and to cause inconvenience to the military postal service.
17. To destroy, steal, damage or change the position of signals, indicating posts, placards, etc., rendered necessary by military operations.
18. To prejudice the needs of our army by rendering water not drinkable, or by hiding vehicles, commodities, supplies and fuel.
19. To destroy or prevent the working of aqueducts, or to suppress the electric light.
20. To coin or alter money, notes and Japanese military *assignats* and to make use of them whilst being aware of their fraudulent character.
21. To oppose requisitions in general, such as the lodgment or hiring of coolies, or to fail to comply with any requisitions.

22. To prevent by trickery or threat any duty imposed on individuals serving in our army.

23. To be in possession of arms and military stores without authority.

24. To enter ports, batteries, or other prohibited places without permission.

25. To infringe the prohibition against entering or remaining in forbidden radii.

26. To make trenches in the mountains and hills without authority.

27. To inspect, sketch, photograph or make descriptions of views on land or sea without authority.

28. To plunder articles belonging to the wounded or dead on the field of battle.

29. To exhume or destroy dead bodies on the field of battle or to steal articles found on them.

30. To put to death Japanese or allied soldiers.

31. To assassinate or steal with violence.

32. To provide opium, to procure the instruments for smoking it and a favourable place to enable our soldiers, allies and other persons attached to the army to make use of it.

33. To commit any other acts detrimental to the Japanese Army.

34. To disobey orders given by our army.

35. Acts detrimental to our army of which mention is not made above will be punished according to the military or naval penal law, or according to the ordinary penal code of Japan.

Japanese
Proclama-
tions in
short and
simple
Chinese
words.

An excellent method of acquainting the illiterate people of Manchuria with their obligations to the occupying Japanese forces was adopted in the 1st (General Kuroki's) army. Proclamations were placarded in which no sentence exceeded four Chinese words and in which the inhabitants were warned, in the simplest language, against refusing to fill requisitions, against sending information to the Russians, against cutting telegraphs, etc., etc.¹ The same plan was followed in the case of the Proclamations forbidding the concealment of weapons found on the field of battle. The Japanese authorities devoted especial attention to controlling the possession of arms by the inhabitants, and therein they showed their practical wisdom, for the limitation of the right to keep weapons is one of the *arcana* of the successful government of an occupied province. Had the British authorities seen that

Japanese
measures
for con-
trolling
the pos-
session of
arms by
the in-
habitants.

¹ Ariga, *op cit.* p. 443.

their orders as to the surrendering of arms were properly carried out, the last South African War might have ended far sooner than it did. The burghers surrendered "arms," but the arms were largely of a kind which no self-respecting Boer would go shooting rock-rabbits with. The Mausers were often hidden away till it suited the owner's purpose to go on commando again; and even when rifles of a serviceable nature were really surrendered, they were sometimes "destroyed" by the British in such a way that they could be repaired and used again. De Wet says that he himself carried the 200th rifle which had been "burnt" at Potchefstroom and recaptured when the British left.¹ In the Russo-Japanese War, the inhabitants of Manchuria were strictly forbidden to possess arms except in certain defined cases. Very large numbers of rifles were abandoned by the Russians on the battle-fields and these were at first secretly appropriated by the Manchurians. The condition of the country gave them some justification for doing so. Even in peace-time, the Chinese police were practically useless for the purpose of keeping the Chunchuses and robbers in check; and the latter were still more completely masters of the situation in the disorganised state of the country caused by the war. It was essential that some of the inhabitants should have weapons for the general protection of the scattered homesteads and villages, and the Japanese generals therefore, while absolutely forbidding the removal of rifles or rifle-barrels from the battle-fields and severely punishing any who offended in this respect, issued weapons *on loan* to the residents in the villages. The chief men of each village were made responsible for the proper use of the arms loaned and were charged with protecting the railways, telegraphs, *dépôts*, etc., in the locality. If they failed in their engagement, the village was fined, or, in aggravated cases, burnt down.²

Breaches of martial law regulations and offences against the laws of war are dealt with by military tribunals. In the British army such tribunals are called "military courts under martial law," to distinguish them from "courts-martial," which

Tribunals
for ad-
minister-
ing
martial
law.

¹ *Three Years' War*, p. 192.

² *Ariga, op. cit.* pp. 413-14, 421.

The
British
system.

are courts established, either in peace or war, to try persons subject to the British Army Act. Under the procedure followed in the South African War, any commanding officer could convene a military court, or he could depute his power to an officer under his command not below the rank of captain. The courts had unlimited power, and might, in addition to the punishments authorised by the Army Act (death, imprisonment with or without hard labour, and penal servitude) impose a fine on the defendant. Fines were, as a matter of fact, inflicted in a very large number of cases; there are records of Boers being fined £500 and even £1,000.¹ The court consisted of three members at least, of whom one was President, with a casting vote. Proceedings were held in open court and all evidence and the defence were written in full. Generally speaking, the procedure of field general courts-martial was followed.² The verdict went by the majority, but the concurrence of the whole court was required for a death sentence. Sentences of death or penal servitude were confirmed by the commander-in-chief; other sentences by the convening officer. As a matter of fact, all sentences of death or penal servitude were reviewed by Sir Richard Solomon, Attorney-General of the Cape, before being sent to the commander-in-chief for confirmation.³ Smaller breaches of martial law regulations were not brought before military courts, but were dealt with summarily by the officer administering martial law (or some officer of at least captain's rank deputed by him), or by the Civil Magistrate, who for this purpose acted on behalf of the administrator and not *quâ* Civil Magistrate. At these summary trials no higher punishment could be inflicted than 30 days' imprisonment or a fine of £10.⁴

The
French
and
German
systems.

The French military tribunals for the trial of hostile nationals are composed in the same way and follow the same procedure as the councils of war which try French soldiers for military offences.⁵ The German system is different; the

¹ *Papers relative to Martial Law* (Cd. 981), pp. 141, 147-8.

² That is, a court convened during active service to try a British officer or soldier, or other person subject to the Army Act.

³ *Wyman's Army Debates*, Session 1902, Vol. I, pp. 380-1.

⁴ For the above generally, see Cd. 981, pp. 82-4.

⁵ Bonfils, *op. cit.* sec. 1173.

tribunals established under martial law "render justice as founded on the essential laws of justice," and are bound to no special form or procedure.¹ They deal with every case on its merits—an excellent plan were it certain that every court were enlightened, unprejudiced, and calmly judicial. Precedents and rules of procedure are unquestionably valuable in keeping up the general standard of the administration of justice, if not to an ideal, at least to a respectable level. The stereotyped penalty pronounced by the German courts in 1870-1—death—was in a great many cases not inflicted.²

The tribunals employed by the Japanese in the war with Russia are called by Professor Ariga "courts-martial." They were special war courts, composed of officers and military or civil officials, and their procedure was very expeditious, as compared with the slow and laborious procedure of the "councils of war," which tried offences (spying, war treason, etc.) against the laws of war. A minimum of three members composed the bench and the verdict went by a majority. The accused was given means to defend himself, but contrary to the rule in an ordinary penal trial, his guilt was assumed in the absence of proof of his innocence. The death penalty was prescribed for nearly all the contraventions of martial law, but the court was allowed to inflict a lighter penalty, or even to acquit the accused at its discretion. "The end of martial law," says Professor Ariga, "being intimidation rather than the punishing of acts which are immoral or contrary to the public interest, when this end is attained, it is unnecessary to punish every infraction."³

The principle of throwing the *onus* of proving his innocence on the accused appears unjust and cruel, but it is a necessary principle of martial law justice. The occupant's interest is to secure the maintenance of order and compliance with his martial law regulations, and he cannot, under war conditions, be expected to adhere scrupulously to the rule of abstract justice which forbids the presumption of anyone's guilt and which regards with horror the punishing of an innocent person.

¹ *Kriegsbrauch im Landkriege*, p. 65.

² Ariga, *op. cit.* p. 381.

³ *Ibid.* p. 385.

The Japanese system.

Under martial law the guilt of the accused is assumed.

Vicarious punishment is the very soul of *reprisals* and reprisals are still, unfortunately, a living part of martial justice. "In campaign law, the great object is to punish someone, and by preference, the guilty, for every offence committed; but in no case to leave an offence unpunished."¹ One may perhaps say that it is from a blending of the principle of reprisals with the principle of ordinary justice that the rule of presuming the guilt of a person charged before a martial law tribunal has resulted.

Confiscation of property as a punishment under martial law.

Cases in the Franco-German War; in the Anglo-Boer War;

The punishment of offences against the laws of war or the martial law regulations of an occupying belligerent usually takes the form of imprisonment or capital punishment or fine. But in some modern wars confiscation of goods has been resorted to, and some authors have questioned the legitimacy of such a form of punishment. When the Germans occupied Alsace-Lorraine they decreed that every inhabitant who left the province to join the French army should be punished by "the confiscation of his fortune, present and future, and a banishment of ten years."² In the last Anglo-Boer War, four burghers of the Free State were sentenced to one year's imprisonment with hard labour and confiscation of all their lands, goods and property, for occupying premises on which they knew arms to be concealed; and this sentence was confirmed by the Commander-in-Chief.³ Again, two Boers were sentenced to confiscation of real and personal property, and to penal servitude for three years, for concealing arms and violating the oath of neutrality; in this case, the Commander-in-Chief remitted the confiscation of real property.⁴ There were many other cases in which the military courts ordered the confiscation of goods for breaches of martial law regulations,⁵ but such sentences were not approved by the confirming officer. The question arose again in the Russo-Japanese War, in connection with the confiscation of the goods and houses of some Chinese merchants of Dalny and Mukden who were proved to have been guilty of "war treason" but who fled before

and in the Russo-Japanese War.

¹ Sutherland Edwards, *The Germans in France*, p. 285.

² Hall, *International Law*, p. 477, note.

³ *Papers relative to Martial Law* (Cd. 981), p. 194.

⁴ *Ibid.* p. 198.

⁵ *Ibid.* pp. 196, 197.

the Japanese authorities could seize their persons.¹ Professor Ariga considers that the confiscation in this last case may be justified, not on the ground that it is a punishment under the Chinese penal law, but by the precedents of modern European war, which show that confiscation is known to the customs of war.² But when one gets back, behind precedents, to the principle of the matter, it is by no means easy to give a definite answer as to the propriety of confiscation. It is a method of punishment which is conspicuously open to abuse; but so, in almost equal degree, is punishment by fine. Bluntschli raises the objection to the German decree of 1870 that the effects of the punishments prescribed by it last beyond the period of hostilities, whereas martial law punishment ought to end with the war.³ Yet if no punishment of a military court were ever to outlast the war, the kind of imprisonment that is really deterrent—one year and over—would have to be left outside the category of military punishments; for the tendency of history is to make wars short and swift and if a “Seven Weeks’ War” is abnormal, a war that is fought and done with in a year or thereabouts may fairly be taken as representative, in the matter of duration. If a court cannot inflict heavy sentences of imprisonment, it will be disposed to insist on capital punishment in many cases in which a less penalty, but still a severe one, would have sufficed. Again, as regards the ethics of confiscation, one may argue in support of it that if a living dog is better than a dead lion, a man despoiled is better than a man killed; and that if his fate be in the balance, he would himself gladly purchase his life by the surrender of his goods. It is allowable to fine an offender say £1,000: is not this confiscation? In the case of the Chinese merchants, it was essential to impose a heavy punishment for the sake of intimidation, and as the men had fled, the only possible punishment was the seizing of their property. So far, again, as the victim is affected, there is no difference between the destruction of his property and the confiscation of it. In every modern war, the destruction of houses, farm buildings and villages has been one of the modes in which the outraged

The propriety of confiscation as a punishment considered.

Destruction is recognised as a punishment: why not confiscation?

¹ Ariga, *op. cit.* pp. 397–9.

² *Ibid.* pp. 400–1.

³ Bluntschli, *op. cit.* sec. 540.

Farm-
burning
in the
Boer
countries.

majesty of war law has avenged itself; such a form of punishment seems to recommend itself above all others to the military mind, if one may judge from the events of history. Whole towns (*e.g.*, Ablis and Fontenoy) were burnt down in the war of 1870-1, to punish the inhabitants for breaches of war law. The record of the farms and buildings burnt in 1900 by the British troops, as a punishment, and before the policy of devastation was adopted, fills many sombre pages of a British Blue Book. One may question, as *The Times* historian does, the *policy* of burning houses as a method of intimidation,¹ but the war right of an occupant to punish in such a manner is undoubted. In January, 1902, Sir Henry Campbell-Bannerman inquired, in the debate on the Address, if farm-burning had been abandoned? Mr. Balfour replied:

As we understand the matter, farm-burning is not given up in those cases where farm-burning is a military necessity. . . . The Boers are perfectly alive to the fact, as we are, that by the laws of all civilised warfare there are circumstances which render it expedient, right, and even necessary, to use the penalty of farm-burning. And when these circumstances arise, I hope and believe that our generals will not shrink even from that necessity, painful as it must necessarily be.²

The first indiscriminate destruction was, however, stopped in November, 1900. An officer who belonged to a column which was largely employed on such punitive work relates that as there were so many grounds on which farms could be burnt—because they had sheltered Boers, because the owners were absent on commando, because the railway had been destroyed in the neighbourhood—his column generally burnt all they came to—to “make sure”—only sparing those of which a list

¹ *Times History*, Vol. IV, p. 494; the writer says—“The policy fitfully adopted after the beginning of June (1900) of burning down farmhouses and destroying crops as a measure of intimidation had nothing to recommend it, and no other measure aroused such deep and lasting feelings of resentment. The Dutch race is not one that can be easily beguiled by promises or moved by threats; farm-burning as a policy of intimidation totally failed as anyone acquainted with the Dutch race and Dutch history could have foreseen. British officers who had served on the Indian frontier had been accustomed to the destruction of the towns and villages of the tribesmen as a normal act of war, inseparable from the conduct of hostilities.”

² *Wyman's Army Debates*, Session 1902, Vol. I, p. 45.

had been handed to the column on setting out.¹ The outcry in England led to the abandonment of this policy, which was clearly both unjust and impolitic, and on 18th November, 1900, Lord Roberts issued the following order:

Lord
Roberts's
order as
to farm-
burning.

As there appears to be some misunderstanding with reference to burning of farms and breaking of dams, Commander-in-Chief wishes the following to be lines on which General Officers Commanding are to act:—

No farm is to be burnt except for act of treachery, or when troops have been fired on from premises, or as punishment for breaking of telegraph or railway line, or when they have been used as bases of operations for raids, and then only with direct consent of General Officer Commanding, which is to be given in writing; the mere fact of a burgher being absent on commando is on no account to be used as reason for burning the house. All cattle, waggons, and foodstuffs are to be removed from all farms; if that is found to be impossible they are to be destroyed, whether owner be present or not.²

Here, it will be noted, the principle—a perfectly sound one—is affirmed that property may properly be destroyed as a punishment of breaches of war law or martial law regulations; and if it may be destroyed, it seems to me to be illogical and almost pedantic to say that it may not be confiscated.

Martial
law is
neces-
sarily
somewhat
primitive
and
despotic.

The gentle reader who has survived my last dozen pages will doubtless have come to the conclusion that martial law is a very drastic, tyrannous, and primitive law—a law which is a jumble of bad old laws—curfew laws, sumptuary laws, conventicle acts, grandmotherly acts which interfere intolerably with individual liberty, which regulate the daily life of the citizen out of all conscience. Indeed, it is so; but there is a cogent reason for its being so. Martial law must be primitive and despotic because it deals with a primitive condition of things, in which the rule of might prevails. It is the law which runs as between the enemy and the local resident and which is established for the former's security; and, as I have said, it must, in the nature of things, consider the enemy's interests first and principally. In matters which do not affect the interests of the invader, the generous principles of the Hague Article, and especially Article

¹ L. Marsh Phillips, *With Rimington*, p. 201.

² *Proclamations of F.M. Lord Roberts* (Cd. 426), p. 23.

XLIII, come into play. That Article is the result of a "boiling down" process which it is instructive to follow. As originally drafted for the Brussels Conference, the Article was spun out into the three following:

Original
Brussels
draft as to
the ad-
ministra-
tion of
occupied
territory.

(a) The enemy who occupies a district can, according to the requirements of the war and in the public interest, either maintain in full force the laws existing there in time of peace; modify them in part; or suspend them altogether.

(b) In accordance with the rights of war, the chief of the army of occupation may compel the Departments, as well as the officers of the Civil Administration of Police, and of Justice, to continue in the exercise of their duties under his superintendence and control.

(c) The military authority may require the local officials to undertake on oath, or on their word, to fulfil the duties required of them during the hostile occupation; it may remove those who refuse to satisfy this requirement, and prosecute judiciously those who shall not fulfil the duties undertaken by them.¹

Final
Brussels
draft.

The Brussels Conference modified the above proposals in such a way as to restrict the occupant's rights, and in the final project of that Conference the three Articles just quoted are found compressed into the two following:

(x) With this object (*i.e.*, to maintain public order) he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.

(y) The public service, and the functionaries and officials of every class, who, at the instance of the occupier, consent to continue to perform their duties, shall be under his protection. They shall not be dismissed nor be liable to summary punishment unless they fail in fulfilling the obligations they have undertaken, and shall be handed over to justice only if they violate those obligations by unfaithfulness.²

The
Hague
debate.

The refining and concentrating process was continued at the First Hague Conference, which combined Article (x) with the Article which preceded it, and suppressed Article (y). At this Conference a determined opposition was offered by the Belgian delegation (which could speak impersonally and impartially, since Belgium is a neutralised State) to every proposal which seemed to give an invader a right to services or tribute in the

¹ Brussels B.B. p. 159.

² *Ibid.* pp. 248, 320.

territory of his enemy. "It seems to me," said M. Beernaert, "that we ought not to sanction beforehand, as a right, that which belongs necessarily to the domain of fact and force." He admitted the propriety of an international convention to respect private property, buildings devoted to art or charity, or to confine taxation to certain defined objects; but he pressed strongly for the principle that the war rights of an occupant should not be specifically recognised in the Convention, but should rather be left "under the empire of that silent, universal law which results from the principles of the law of nations."¹ The Dutch delegate lent his colleague strong support in the discussion to which the Brussels Article (*y*) gave rise. Any disposition, said the latter, which seemed to authorise, directly or indirectly, the officials of the invaded country to enter the service of the invader, was a disposition which ought to be struck out. This view prevailed, though it was not disputed that certain officials, notably those of municipalities, would sometimes best fulfil their moral obligations to their country by remaining at their posts, despite the presence of the enemy.²

The principle of the Hague Articles relating to the government of an occupied country is both humane and wise. It is all to the occupant's advantage to let well alone. It is his interest to accept an existing routine, to interfere as little as possible with the ordered cycle of daily life, to avoid altering laws or regulations which are compatible with a "state of siege," and to see that justice is administered properly in civil and criminal cases, which end will usually be secured by leaving existing institutions in force. Recruiting laws must obviously be suspended. An occupying belligerent cannot allow the adult males of a territory, of which he is the *de facto* ruler, to swell the number of his active enemies. "The conscription ordered by the French Government," says the German *Official History of the War of 1870-1*, "had to be resisted by preparing lists and keeping a sharp watch over those persons who were eligible as soldiers. This was especially necessary in the districts of Alsace that bordered upon Switzerland."³ I have already referred to the decree which was issued in Alsace-

The principle of maintaining existing laws is wise and humane.

Recruiting laws must be suspended.

¹ Hague I. B.B. p. 53, 54.

² *Ibid.* p. 148.

³ German *Official History*, Part II, Vol. III, p. 138.

Lorraine and which subjected any person leaving the provinces to join the French armies to banishment and confiscation of his goods.¹ In other occupied territories, if persons subject to the French conscription left their homes clandestinely and without sufficient motive, their relatives were fined fifty francs for each day of absence.² The German measures were drastic, but, as Hall observes of the Alsace-Lorraine decree, they were possibly the least severe measures that could have sufficed to end a practice which was a very great and direct danger to German military interests. One can hardly question a belligerent's right to prevent, by force of arms, the inhabitants of an occupied province from joining their national army, and if he may shoot down those who try to do so openly, he may reasonably claim the right to mete out severe punishment to all principals and abettors in any treacherous and secret attempt which has the same object. To play at being a non-combatant, with the rights and immunities which the character gives, until one can steal away to the national standard, bringing, perhaps, invaluable military information as to the occupant's dispositions and numbers, is, so far as the occupant is affected, a hostile act which merits condign punishment.

The rule as to maintaining existing laws applies especially to civil and criminal laws.

The practice of modern wars has been to leave existing laws in force, unless they are quite irreconcilable with a state of occupation, as recruiting laws are. It was decided at the Brussels Conference, and it is recorded in the Protocols as a commentary on the text, that the provision as to maintaining existing laws is meant to apply especially to civil and penal laws; usually there should be no necessity for suspending or modifying such laws, as there may be in the case of political, administrative, and financial laws.³ Professor Holland says that it may be necessary to vary the criminal law, as well as the other branches of Public Law⁴; but generally an occupying belligerent does not interfere with criminal law any more than with civil. After the fall of Santiago in 1898, General Shafter was instructed by President McKinley to proclaim that the civil laws of the conquered territory, so far as they touch private rights, persons, and property, and the punishment of crimes,

¹ See p. 350, *supra*.

² Hall, *International Law*, p. 477, *note*.

³ Brussels B.B. pp. 239, 291.

⁴ *Official Laws and Customs of War*, p. 34.

will be considered as remaining in force, so long as they are compatible with the new state of things.¹

And General Miles informed the people of Porto Rico when he established his occupation that "the government of the United States would make no change in existing laws so long as the people complied with the rules of the military administration and kept order."² In 1900 the British authorities maintained the "Common or Statute Law of the Transvaal" in the occupied territories, and all offences (torts or crimes) affecting the occupying army or its interests were dealt with under that law.³ The Japanese did not interfere with the Chinese penal laws in Manchuria during the Russian War, except in so far as they clashed with the regulations under martial law. Indeed, the Japanese military tribunals borrowed to some extent from the Chinese law in their administration of martial law; for instance, they adopted the practice of *rewarding*, as well as punishing, as a means of enforcing penal and administrative regulations, and they imposed Chinese criminal punishments such as the pillory and flogging.⁴

Usually an occupying army finds a law of the soil in existence, but it may happen that there is none—none worthy of the name, at least—and then there is no alternative but to create laws for the governing of the country. Such a condition of things would rarely be found in civilised war; perhaps the only modern instance is that of Bulgaria in 1877-8. The Russians, says Professor de Martens, were quite unable to comply with the Brussels rule which enjoined respect for local laws and institutions, for local laws and institutions there were none. The country was in an anarchical state, and the occupying army had to establish a completely new social and political régime, both for its own security and for the good of the inhabitants.⁵

The occupant may create laws where none exist

One comes now from the law to the courts which administer the law. As the maintenance of order makes for the occupant's interest

It is the occupant's interest

¹ *R. D. I.* September October, 1898, p. 800.

² *Ibid.* p. 801.

³ See Proclamation "No. 20 of 1900," dated 1st October, 1900, in *Proclamations of F. M. Lord Roberts*, p. 20; see also "No. 19 of 1900," p. 19.

⁴ Ariga, *op. cit.* pp. 386, 389, 410.

⁵ De Martens, *la Paix et la Guerre*, p. 243.

to let
justice be
adminis-
tered as
before.

But in
some cases
he may
have to
erect
courts or
appoint
judges.

Difficul-
ties in con-
nection
with the
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tration of
justice in
1870-1.

security, it is his interest to allow the ordinary administration of justice to continue as before. To see that justice is done as between man and man, and that malefactors are brought to book, is an essential condition of good government and promotes the submission of the inhabitants to the rule of the stranger. Delicts and crimes against common law can usually be adequately dealt with by the local courts, and it is only in the case of attempts upon the occupying troops or infractions of martial law regulations that an occupant would ordinarily find it necessary to administer justice himself. But if the machinery of justice has been so dislocated by the events of the war as to be out of gear or inoperative—if, for instance, the courts have been closed and the judges have fled or if the judges decline to sit, then the occupant is fully entitled, and indeed called upon, to establish special tribunals for trying offences against common law. In 1900, Lord Roberts found it necessary to erect such courts in the Transvaal, to deal with "offences under the Common or Statute Law of the Transvaal," and magistrates were appointed to preside over such courts.¹ A central court was established at Pretoria to have cognisance of all cases, civil, criminal, and mixed; its heavier sentences were subject to the confirmation of the Military Governor of Pretoria.² A like difficulty in respect to the administration of justice was experienced by the Germans in 1870-1. Some of the French courts suspended their functions and German magistrates had to be appointed instead. The ground for the action taken by the local judges was a suspicion that the German military authorities wished to interfere with the freedom of the courts and the administration of justice; but there was also an element of difficulty in the fact that France had ceased to be an Empire and had become a Republic since the time when the magistrates were appointed. The Germans had political objections to recognising the newly-formed Republic, while all France was averse from owning the authority of "the Man of Sedan"—the ill-fated Napoleon III. As a compromise, the court at Nancy was asked to dispense justice "in the name of the High German powers occupying Alsace and Lorraine," and the courts of Laon and Versailles

¹ *Proclamations of F.M. Lord Roberts*, pp. 19, 20.

² *Ibid.*, p. 9.

"in the name of the Law." All three declined, and German judges were set up in their stead.¹ The former of the two formulae mentioned above is clearly objectionable, for it amounts to recognising the sovereignty of the invader: but it is hard to see any objection to justice being administered "in the name of the Law." It is an innocuous formula, which has the blessing of such jurists as Bluntschli and Hall, and it would have surmounted the difficulty caused by having "two kings at Brentford"—the Republic and the Emperor. The judges were perfectly entitled to suspend their functions, but I confess I cannot see anything transcendently "noble" in the action of the Versailles and Laon courts. They were not threatened, as the Nancy court was, with German interference and pressure, and I think it is French patriotic enthusiasm rather than a critical appreciation of all the circumstances that has led the French writers to hold them up to admiration.²

In the occupations established during the Spanish-American War, "the administration of justice remained exactly the same in principle as under the Spanish rule. The magistrates who consented to remain continued to render justice, and to render it in the name of the government which had appointed them." Administration of justice in the Spanish-American War. Except for offences against the United States Army, the repression of all crimes and delicts was left unchanged under the occupation, and Spanish judges dispensed Spanish laws although Spain's power had ceased in the islands for all other purposes.³ In the Russo-Japanese War, the Japanese authorities left the hearing of all causes as a general rule to the Chinese tribunals, and it was only in the three following cases, says Professor Ariga, that crimes and delicts under common law were dealt with by the occupying army:—

(1) In the district of Kuang-Tong and in the port of Ying Keou, where there were no Chinese functionaries, the maintenance of order was the duty of our army; consequently, it had to repress all the crimes and delicts of common law.

(2) In the territories where there was a Chinese governor, it devolved on the latter to punish all crimes and delicts, except treason, against our army. But, as a matter of fact, cases

¹ *Kriegsbrauch im Landkriege*, p. 66; Bonfils, *op. cit.* sec. 1167.

² See Hall, *International Law*, p. 476; Bluntschli, *op. cit.* sec. 547.

³ *R. D. I.* September-October, 1898, p. 801.

occurred in which the offender had not the intention of injuring our forces, but in an indirect way the honour, interest, and dignity of our troops were assailed; for example, in the case of attempts upon our soldiers, robberies of provisions, "uttering" of false military *assignats*, etc., such acts had to be repressed directly by our army or indirectly by the Chinese authority on the demand of our army.

(3) Crimes which had no relation with our army were sometimes punished by it, on the demand of the Chinese authorities. It was so especially after a great battle, when the local authorities were unable to restore order on the battlefield and entrusted this duty to our troops. It was thus for several months in the neighbourhood of Mukden.

In these three cases, the Commission of Military Administration, or, in its default, the post commandants, tried the offences and delicts of common law; the *gendarmes* formulated the accusation and executed the sentences. . . . Sentences of imprisonment were usually carried out in the Chinese prisons.¹

Adminis-
tration of
justice
in the
Anglo-
Boer War.

One finds the same principle of non-interference with the ordinary local courts promulgated in the official orders relating to martial law which were issued in the Anglo-Boer War. A "Confidential Memorandum," dated 30th January, 1900, which applied at first only to proclaimed districts of Cape Colony, but was subsequently extended to the Orange Free State, instructed the commanders in the field to allow ordinary offences to be dealt with by the civil magistrates' courts in the usual way; only such offences as aiding the enemy, seditious language, destroying railways, etc., as well as breaches of martial law regulations, being taken up by the military courts.²

The civil
and muni-
cipal ad-
minis-
trations
under
occupa-
tion.

In all civilised countries there exists a vast and complex organism whose function is the performance of those duties for the sake of which all State Government is established. That organism is, *anglice*, the "Civil Service." The duties it is charged with performing are mostly as necessary in war as in peace, and they are duties which an occupant would have to perform by means of his own agents should he find no officers of the old Government already carrying them out. Besides the officials of the Civil Service, a great number of municipal

¹ Ariga, *op. cit.*, p. 410.

² *Papers relative to Martial Law in South Africa* (Cd. 981), p. 23.

officials are also engaged in the practical administration of public affairs. No government could be carried on without the assistance of a vast number of public servants, whose diverse, manifold duties correspond with all the needs and activities of that complicated human machine, the modern organised State community. The position of the administrative officials in an occupied territory is a delicate one; they are dragged one way by their duty to the State and the bond of patriotism, the other by their duty to the population to whose service they were assigned. Conventional war law gives them their choice of abandoning their posts or of remaining and serving the occupant. The latter is usually eager to accept their services, for he is relieved, *pro tanto*, of the troublesome and costly obligation of finding officials of his own—strangers to the country and its customs and needs—to carry on the detailed work of administration. He may take measures to control and supervise the work of the old officials, in such a way as to serve his military interests, but it is all to his advantage to let them continue to perform their useful necessary functions with as little interference as possible. When Sherman occupied Memphis in 1862, he addressed a letter to the mayor in which he said :

It is best for the occupant not to interfere with administrative officials.

. . . . Unfortunately, at this time, civil war prevails in the land, and necessarily the military, for the time being, must be superior to the civil authority, but it does not therefore destroy it. Civil courts and executive officers should still exist and perform the duties, without which civil or municipal bodies would soon pass into disrespect—an end to be avoided. I am glad to find in Memphis a mayor and municipal authorities not only in existence, but in the co-exercise of important functions.¹

Sherman's orders on this point at Memphis,

At Savannah, again, in 1864, he allowed the Mayor and the City Council to continue to exercise their functions, and "in concert with the commanding officer of the post and the chief quartermaster, to see that the fire companies are kept in organisation, the streets cleansed and lighted, and keep up a good understanding between the citizens and soldiers."² The German commanders made use of the French municipal officials in 1870-1. Such officials, says the German *Official History*,

and Savannah.

The Germans kept municipal

¹ Sherman, *Memoirs*, Vol. I, p. 270.

² *Ibid.* Vol. II, p. 233.

authorities in office in 1870-1.

"rightly appreciating the true interests of their country, carried out their duties, even under the most trying conditions."¹ Sometimes, however, they endeavoured to continue their work without reference to German control, and in such cases the German Governor-General took the administration out of their hands.² Usually, in the occupied towns, a German official was appointed to act in conjunction with the municipal committee.³ Police duties were sometimes left entirely to the French *gendarmes* or National Guards (as at Versailles), but the apathy of the local police authorities, or the paucity in numbers of the French police, made it necessary sometimes for the German Field Gendarmerie to be employed on such duties as well. At Rouen, a mixed duty was arranged, the streets being patrolled by parties of two Prussian field *gendarmes* and two French *sergents-de-ville*.⁴

French Government officials refused to serve under the Germans in 1870-1.

If the municipal authorities were willing to serve the invader, the French Government officials, in the great majority of cases, refused to continue in office. The Germans had contemplated securing the assistance of the civil functionaries in the work of administration, as will be seen from the "Instructions for the Governor-General of an occupied Province" which were issued by the King of Prussia on 21st August, 1870.⁵ These instructions directed the Governors to avail themselves of the services of the civil administrative authorities of their districts. But, as a matter of fact, nearly all such officials either fled or refused to serve under the Germans. In the latter case, they were sent into the interior of France.⁶ It is very doubtful if the French people themselves did not suffer more than the German armies from the absence of the civil officials. What Bluntschli says of the action of the

¹ German *Official History*, Part II, Vol. III, p. 137.

² *Ibid.* p. 137.

³ Cassell's *History*, Vol. I, p. 395.

⁴ German *Official History*, Part II, Vol. III, p. 233. A similar method was followed at San Stefano in 1878, mixed patrols of Russian soldiers and Turkish *gendarmes* parading the streets. It did not work well there, but San Stefano could hardly have been kept in order, at that time, by anything short of a battalion picketed in each street. See Von Pfeil, *Experiences of a Prussian Officer in 1877-8*, p. 311.

⁵ German *Official History*, Part I, Vol. II, appendix 54.

⁶ Busch, *Bismarck*, Vol. II, p. 177.

Austrian authorities in the Seven Weeks' War, is of general truth and applicability:—

It is bad policy to do what the Austrians did in Bohemia in 1866 at the time of the Prussian occupation—to order all the functionaries and even the *gendarmes* to leave the country which the enemy was about to occupy. The enemy suffers much less from such a measure as this than the inhabitants themselves, in whose interest the administration is established. The Government incurs a very grave responsibility towards its subjects in abandoning all the public offices and services to the mercy of the enemy.¹

Professor Ariga also insists on the moral duty of the civil administrative officials of an occupied country remaining at their posts in the interests of the inhabitants themselves.²

The *political* officials of the old Government cannot, obviously, do any good by remaining, for their employment under the occupation is out of the question; but the case of the ordinary civil, financial, and police functionaries is quite different. Yet in most modern wars, the officials generally have preferred to resign their posts to serving the invader. No trace could be found of the Ottoman officials when the Russian armies established their occupation of Turkish territory in 1877.³ The Greek officials resigned, under the orders of their Government, when Thessaly was occupied in 1897.⁴ On the other hand, the Saxon functionaries showed themselves more complacent than those of Bohemia in the war of 1866, and so did the civil officials of the occupied territories of Nassau, Frankfort, Bavaria, and Hesse-Darmstadt. In these cases the old administrations and officers were retained, but under the supervision of Prussian Commissioners.⁵ The circumstances of Korea and of Manchuria during the Russo-Japanese War were peculiar, for they were not, strictly speaking, hostile countries. But the occupying Japanese armies were not the less interested on that account in seeing that the civil administration was carried on without a hitch and that order was maintained. At first the Korean officials fled before the occupying forces, but they were ordered

¹ Bluntschli, *op. cit.* sec. 541.

² Ariga, *op. cit.* p. 429.

³ De Martens, *op. cit.* p. 321.

⁴ *R.D.I.* September–October, 1897, p. 709.

⁵ Hozier, *Seven Weeks' War*, pp. 126, 311.

to return by the government of Seoul, and on their return they carried out the duties of administration, subject to the control of the Japanese commanders in all questions of military interest.¹ The Manchurian officials, too, were retained in office: where no officials could be found, the notables of the village were directed to take steps to provide for the administration of the locality. In only one instance during the war was the Chinese Government requested by the Japanese authorities to remove a local functionary. As Professor Ariga points out, the nature of the circumstances made it easier than it normally is for the local officials to remain with a clear conscience at their posts, for they could do so without feeling that they were serving under the enemies of their country.²

Spanish officials retained at Manila in 1898, but not at Santiago.

In this, as in some matters, there was a divergence between the practice of the United States in the Philippines and in Cuba in the war of 1898. Both at Santiago and at Manila the Spanish functionaries remained at their posts. Those at Manila were retained in office. At Santiago, General Shafter decided at first to keep the municipal authorities in power; this decision of his was, indeed, the occasion of his breach with the Cuban insurgent chief, Garcia, who declared, when informed of it, that "he could not go where Spain ruled." Shafter's intention was to form a mixed military and civil administration. However, President McKinley, after an abortive proposal had been made to entrust the administration to a Council elected by the people, decided that the difficulties in the way of constituting a government on the basis of universal suffrage were insuperable, and ended by abolishing the civil administration and establishing a purely military one.³

The Japanese Commissioners of Military Administration.

The local functionaries of an occupied territory are brought into touch with the occupying army in many ways. Besides their general duty of carrying on the administration of the country, to the common benefit of the people and the foreign army, they constitute the channel through which the war rights of the occupant to services, to requisitions, to contributions, are exacted from the inhabitants, and it is usual to make them

¹ Ariga, *op. cit.* pp. 56, 58, 59.

² Ariga, *op. cit.* pp. 427, 429.

³ *R.D.I.* September-October, 1898, pp. 803-4; Titherington, *op. cit.* p. 320.

collectively responsible for compliance with the occupant's martial law regulations within the sphere of their authority. It is, therefore, a matter of moment that an understanding should be arrived at between the local bodies and the occupying troops. To secure this end a special corps of "Commissioners of Military Administration in Manchuria" was formed at Tokio at the beginning of the Russo-Japanese War and despatched to the seat of war. It was composed of officers of the Headquarter Staff who were familiar with Chinese manners, customs, and language, and its function was to act as a "buffer" between the Japanese armies and the Chinese authorities. The Japanese commanders were instructed to address the Commissioners on all subjects relating to requisitions and the like, and the latter, from their local knowledge, were able to "manage" the Chinese functionaries, and to obtain without difficulty everything that the armies required. The plan was found to work admirably, and Professor Ariga suggests that it is one which might be employed with advantage in future wars. It is obviously calculated to lessen friction and to promote sympathy and a good understanding between the troops and the inhabitants.¹

A functionary who accepts service under the occupant retains his right to resign subsequently, and cannot be punished for exercising it. This was agreed at the Brussels Conference.² His service is a voluntary one; but reasonable notice of the intention to resign is obviously desirable, and the occupant may require such notice in order to prevent a breach in the continuity of administration.

May the occupant exact an oath of fidelity from such officials as take service under him? The French official manual says no, the German and American manuals say yes.³ Professor Le Fur states that the practice of imposing an oath of this kind is "to-day universally rejected," and he points out that the Americans required no such oath in the Spanish War, despite the provision of the *American Instructions*.⁴ Hall and Bluntschli, on the other hand, hold that the occupant may properly require

Resignation of officials.

Can an oath of fidelity be exacted from retained functionaries?

¹ Ariga, *op. cit.* p. 69.

² Brussels B.B. p. 243.

³ *Manuel à l'Usage des Officiers*, pp. 98, 109; *Kriegsbrauch im Landkriege*, p. 65; *American Instructions*, Article 26.

⁴ *R.D.I.* September-October, 1898, p. 803.

officials serving under him to swear to obey his orders and not act to his prejudice.¹ To me the latter view appears the more correct one. If the old officials consent to serve the new ruler, they become his *officials*, and owe him that faithful *official service* which is not so much the tribute of a patriotic subject, as the performance of work in return for the payment of a salary. Many a servant of the State has, in peace-time, to serve a Government whose politics he abhors, but whom he serves faithfully, none the less, for the sake of his bread and butter. The oath in question is not one of allegiance; it touches the official as an official, not as a subject, and his taking it in no wise affects his nationality. The fact that the service is voluntary does not lessen the official's duty to serve faithfully so long as he does serve; and if the occupant wishes to bind him to such a duty by the sanction of an oath, he is asking no more than what the very acceptance of service in the first instance ought to imply. The official can always resign if he does not care to give the oath.

The occupant's acts are valid.

The recognition of the occupant's authority carries with it the recognition of the validity of his various acts of government. Generally speaking, the juridical acts and relations authorised by him or his agents are "good" in law, and cannot be annulled by the legal government on its restoration. "Judicial acts," says Hall, "done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good."² The same writer goes on to point out that to deny the validity of such acts would not only bring the social life of a community to a standstill during occupation—for no one would enter into any legal relation if it were to be nullified the moment the occupation ceased—but that it would be unjust to the individual inhabitants and impolitic as regards the community at large. To recognise an occupant's power to collect taxes, for instance, and, notwithstanding this, to demand those taxes of the citizens a second time, would be most unfair and illogical; to expect him

¹ Hall, *International Law*, p. 476; Bluntschli, *op. cit.* sec. 551.

² Hall, *International Law*, p. 488.

to maintain law and order in an occupied territory, yet to upset all the sentences passed by his courts for common law offences, would be equally inconsistent and impolitic. Considerations of general convenience approve the rule that acts done by the occupant, within his powers as an occupant, stand. But he must not have exceeded those powers. His powers of administration do not extend beyond the duration of his occupation; he cannot bind his successor, the legal, restored ruler, for to do so would be to encroach on the latter's sovereignty. If the legal government were obliged to recognise the continuing effects of any act of administration carried out under an occupant's authority, a few weeks' occupation might possibly result in servitudes being set up or obligations undertaken, which would prejudice the legal government for a generation.

Excep-
tions to
this
general
rule.

In 1871 an important case arose which, says Sir W. Pitt Cobbett, "illustrates the principle that, although acts done in a country by an invader cannot be nullified in so far as they have produced effects during the occupation, yet they become inoperative for the future, *jure postliminii*, so soon as the original government is restored."¹ During the German occupation of Eastern France in 1870-1, the occupying authorities sold 15,000 oaks growing in the government forests in the Departments of the Meuse and the Meurthe, and were paid therefor in advance. When peace was signed, all the trees had not been cut and the contractors claimed that their rights in the matter should be recognised by the French Government. But the latter declined to entertain the claim, holding that the re-establishment of the legal government had *ipso facto* nullified the contracts entered into by the usurping government, and Germany agreed to this statement of the law of the case.² It is obvious, again, that the restored government is not obliged to uphold any act done by the occupant which is from the first *ultra vires*; if, for example, the latter alienates the domains of the State or the sovereign.³ Neither is he called upon to recognise the purely political acts of the occupant, or such judicial sentences as have been inflicted for such military offences as "war treason." But subject to these limitations, as

¹ Pitt Cobbett, *Leading Cases and Opinions on International Law*, p. 226.

² Hall, *International Law*, pp. 420, 489.

³ *Ibid.* p. 489.

Pillet observes, the acts of the occupant "are entitled to respect, and the fact that they are acts done by an enemy does not impair their validity."¹

Inhabitants must not be compelled to furnish military information.

Article XLIV is an extension of the principle contained in Article XXIII, last paragraph, and these two articles gave rise to a very lengthy discussion at the Hague in 1907. The 1899 *Règlement* had only a single article dealing with the subject now legislated for in Article XXIII and XLIV; that article read:

Any compulsion on the population of occupied territory to take part in military operations against its own country is prohibited.

This article was modified and transposed to its present place in the chapter dealing with "The Means of Injuring the Enemy": in its modified state it is now the last paragraph of Article XXIII. But the delegates held that enough had not been done to safeguard the patriotic sensibilities of populations, and the present Article XLIV was therefore proposed, accepted, and inserted in the chapter on Occupation.

The case of guides.

The chief interest of the Hague discussion is its bearing on the intention of the two articles as to the forced employment of guides. The article of the 1899 *Règlement* was interpreted as allowing such employment. That article was identical with the article approved at Brussels, at which conference a longer article had been proposed forbidding the compulsion of inhabitants to take part in "acts of such a nature as to further the prosecution of the objects of the war, to the detriment of their own country."² This provision, it was felt, went too far; as one delegate remarked, "No Government would engage not to press guides into the service, not to employ the labourers of the country on lines of communications, not to compel carriers to transport the means of subsistence, and to perform other duties."³ The original proposition was therefore amended in the sense of the article of the 1899 *Règlement*, which evidently would not have been interpreted by the Brussels delegates as forbidding the forced employment of guides. And the interpretation of the service manuals of Great Britain, the

¹ Pillet, *op. cit.* p. 255; see also Bluntschli, *op. cit.* sec. 731.

² Brussels B.B. p. 172.

³ *Ibid.* p. 267.

United States, France and Germany, was the same as that of the Brussels delegates.¹ There is no doubt that, in practice, the pressing of guides has been resorted to in modern wars without eliciting any strong objection on the score of illegality.

So far for the provisions of the older *Règlement*: what is one to say to the new dispensation—articles XXIII and XLIV? Do they forbid or allow the compulsion of guides? Professor Holland thinks not, and mentions the fact that a proposal to insert an express provision forbidding the pressing of guides was opposed by Germany, Austria, Russia, and Japan.² But, as I have indicated under Article XLIV at the beginning of the chapter, that article has not been found acceptable, as drafted, by these Powers, and one may reasonably conclude, I think, that the rock of offence was the implied prohibition of the pressing of guides contained in its terms. It is quite certain that the committee which approved the article at the Hague in 1907 did intend to forbid the forced employment of guides; this is perfectly clear from the committee's report. Austria had proposed to add the words "as combatants," to the German text (the accepted one) of Article XXIII, last paragraph. "The German proposal," goes on the report, "was of wide application; the Austrian amendment had a very different bearing, as it permitted the forcing of a population to render assistance of any kind so long as it was not actually connected with the battle itself, and especially permitted the compulsion of guides and the adoption of forcible methods of obtaining information. . . . The view of Austria was not shared by the majority. On the contrary, the committee voted in favour of the Netherlands amendment relating to the same subject and of a diametrically opposite tendency."³ The amendment referred to is the present Article XLIV. I entirely agree with Professor Westlake (and his opinion is, I know, that of Professor Bastable also) that the latter Article ought to be conclusive against the forced employment of guides.⁴ Indeed, I think the practice is condemned by

The effect of the Hague articles on the question of compulsion.

¹ British official *Laws and Customs of War*, p. 34; *American Instructions*, Article 93; *Manuel à l'Usage*, p. 110; *Kriegsbrauch im Landkriege*, p. 48.

² Holland, *Laws of War on Land* (Oxford, 1908), p. 53.

³ Blue Book, *Plenary Meetings of the Hague Conference of 1907* (Cd. 4081 of 1908), p. 102.

⁴ Westlake, *International Law*, Part II, p. 269.

the terms of both Article XXIII and Article XLIV. It is forbidden to force the enemy's nationals to take part "in the operations of war," not as combatants only but as co-operators in any military action directed against their own country. If the Article be not mere empty words, it must forbid such co-operation as may result, directly and immediately, in the overthrow of the other army. Now the employment of a guide may have this effect—it is, as a matter of fact, the usual end for which a guide is employed. If you allow such employment at all, you cannot, from the nature of war, prevent its being the potentially deciding factor in a campaign. A competent guide may be of far more value to a general operating in a strange country than very many troops, and it is quite illogical to forbid him to impress men as soldiers if you permit him to impress a guide whose employment may be more militarily important and infinitely more damaging to the enemy than a thousand men in the ranks. Again, looking at Article XLIV, of what possible use is it to forbid an occupant to compel the inhabitants to give him information about the enemy while allowing him to force them to point out, not by words but by actually showing the way, a path by which he may fall upon the national army? The information which a commander wants most of all is very often just this which some would make it alone legitimate for him to obtain by force. If Article XLIV can be interpreted as allowing him to compel an inhabitant, at the point of the bayonet, to furnish him with information as to the means of striking a deadly blow at the enemy—for that is what the employment of a guide may mean—then, I submit, one might just as well be honest about it and strike both the final paragraph of Article XXIII and Article XLIV out of the *Règlement*. The principle of the two Articles is that it is odious to force men to co-operate in the defeat of their national forces and with this principle the forced employment of guides is utterly at variance.

Punish-
ment of
guides for
mislead-
ing a
column.

Usage allows of the capital punishment of a guide who purposely misleads the troops, not only if he has volunteered or acted willingly, but even if he has been compelled. A draft Article relative to guides was submitted to the Brussels Conference in 1874, but as it was a new proposition upon which the

delegates had not received instructions from their Governments, it was not discussed. It ran as follows:

An inhabitant of a country, who has "voluntarily" served as a guide to the enemy, is guilty of high treason; he is not, however, liable to punishment from the moment he has been "compelled" by the enemy to serve in such capacity.

A guide, even when he has been compelled to serve the enemy, is liable to punishment when he has intentionally pointed out the wrong road.¹

The point dealt with in the first of these paragraphs is one with which International Law has no concern; it is a question for the criminal courts of each separate country. But the second paragraph enunciates a principle which has had the support of practice. For its self-protection, an army must deal most rigorously with a guide who deliberately misleads it; and though it may be thought cruel to shoot a guide who has been forced into service, the severity may be justified on general principles as well as by reason of military necessity. Granted that the man has been ill-treated in the first instance—that he has a legitimate grievance; that grievance does not warrant him in doing his compellers such a terrible injury as leading them into an ambushade or into a hopelessly indefensible position. The evil the man has suffered in his own person is no justification for his endangering the lives of a whole army, at any rate in the eyes of that army. However objectionable the original steps taken to secure his services may have been, he is, when his employment has begun, nothing more or less than a guide, and a treacherous guide is subject to the severest penalty of war law. The question has, it is to be hoped, lost its practical importance for future wars, but that it is not altogether an academic one so far as some great Powers are concerned, will be evident to those who have followed the discussions and reservations of the last Hague Conference.²

¹ Brussels B.B. p. 202.

² On the military aspect of the employment of guides, see Colonel A. L. Wagner's *Service of Security and Information*, pp. 101-2. The writer advises the keeping of a guide conspicuously under guard, for his own protection, even when he is acting willingly. "In several instances in the war in the Philippines, natives acting willingly as guides requested to be tied and led with a rope, as a visible proof to their people that their service was not voluntary."

Oath of
allegi-
ance.

Oath of
neutral-
ity.

An oath of allegiance has not, I think, been exacted by a military occupant on any occasion since that already referred to in the Secession War, when Pope forced the Virginians to swear allegiance to the Washington Government. At times, however, an *oath of neutrality* has been required of the inhabitants of an occupied province. The taking of such an oath has no alternative effect on the legal status of the inhabitants; if they never took it, they would still owe the occupant the obligation of remaining neutral. Both the Boers and the British imposed an oath of neutrality on the citizens of the territories they occupied during the South African War.¹ The loyalist inhabitants of northern Cape Colony were expelled from their homes by the Boers, the Boer non-combatant farmers were, later on, made prisoners of war by the British, for refusing to take the oath. The oath which the British required was as follows:—

OATH OF NEUTRALITY.

No.

I, the undersigned,
in the District of

Do hereby solemnly make Oath and declare that I have handed in and given up all the Arms and Ammunition demanded of me by the British Authorities, namely, all Rifles and Rifle Ammunition of whatsoever description they may be. And I solemnly swear that I have no Rifle or Rifle Ammunition remaining, and that I know of none such being concealed or withheld by anybody whatsoever.

And I further swear that I will not take up Arms against the British Government during the present War nor will I at any time furnish any member of the Republican Forces with assistance of any kind, or with information as to the numbers, movements, or other details of the British Forces that may come to my knowledge. I do further promise and swear to remain quietly at my home until the war is over.

I am aware that if I have in any way falsely declared in the Premises, or if I break my Oath or Promise as above set forth, I shall render myself liable to be summarily and severely punished by the British Authorities.

I make the above declaration solemnly believing it to be true,
So Help Me God.

Before me²

¹ *Times History*, Vol. II, pp. 293-4.

² *Proclamations of F.M. Lord Roberts* (Cd. 426), p. 23.

Breach of this oath was usually punished with great severity, especially if the breach were combined with some other offence. Simple breaking of the oath was sometimes punished with Penal Servitude for three or five years; ¹ in one case, at least the death sentence was pronounced but commuted by the confirming officer to ten years' penal servitude.² In other cases, imprisonment with hard labour was inflicted, and sometimes the punishment took the form of a fine.³

Exception has been taken to the oath imposed on the Boers by Professor Despagnet, who treats it as an "oath of fidelity" *i.e.*, an oath of allegiance—which, as he points out, cannot properly be imposed by a mere occupant.⁴ Dr. Baty, on the other hand, considers it of no service whatever, for "the inhabitants are bound to remain quiet without the necessity of any oath."⁵ I, too, venture to lift up my voice against the practice of requiring such an oath, but for reasons other than those I have just mentioned. I think, indeed, that the oath is innocuous and even useful, if it is administered only in territory which is genuinely occupied, and if it is regarded as possessing validity and binding force only for the period of occupation. What the citizen undertakes in the oath is no more than is his duty in any case, so long as the occupation lasts, and the necessity for making a sworn statement brings home to him the nature of his obligations to the occupying belligerent. But if an oath or solemn declaration of this kind is used at all, there is a danger of its use being unduly extended: it may come easily to be administered to persons not residing within a sphere of occupation and to be considered as continuing to bind those who have taken it, or signed it, after occupation has ceased. Any attempt to make the moral sanction of an oath supply the deficiencies of an occupant's material power—to substitute, as it were, the restrictive force of the inhabitant's conscience for that of an effective garrison—is as much to be deprecated as the abandoned German system of occupying districts "theoretically." It seems to me, therefore, that the next Hague

Its legitimacy considered.

¹ *Papers relative to Martial Law* (Cd. 981), pp. 161-4.

² *Ibid.* (Cd. 981), p. 165. ³ *Ibid.* pp. 166, 172, 174, 175.

⁴ Despagnet, *op. cit.*, pp. 215-6.

⁵ T. Baty, *International Law in South Africa*, p. 91.

Conference would do well to prohibit, or at least to sanction only within strict limits, the practice of administering an oath of neutrality. That Article XLV is interpreted by at least one great nation as not forbidding such an oath is evident from Professor Holland's note to the article in the British official manual.¹

The
Magna
Charta of
War Law.

Article XLVI secures for the citizen of an occupied territory immunity from material or moral damage at the hands of the enemy. It is the bond which war law gives him for the security of his person, property, and religious belief. Perhaps some day in the dim future it will be quoted by those who are interested in the constitutional law of nations as lovingly and proudly as we quote *Magna Charta*, with its ringing promise—"We will not go against any man, we will not send against any man, save by legal judgment of his peers and the law of the land." To-day, indeed, the Article is "dead from the waist down." So was *Magna Charta* at first; it was many a weary year before princes and their councillors could be forced to perform what they had promised therein. So, to-day, the provisions of Article XLVI are rather an ideal, a theoretical standard of conduct, than an actual living rule to which the practice of war conforms. Reading the Article, and remembering what does actually happen in war, one is inclined to doubt the utility of a provision which seems to have such little practical effect. Yet, most assuredly, it is a valuable provision. It is valuable to-day and it will be more valuable still in the hands of those who "have got to keep *the ferment of the future alive*," to use Ibsen's striking phrase. There is yeast in it, as there was in *Magna Charta*. One is disheartened when one thinks of requisitions, of contributions, of fines, of reprisals, of houses levelled as a measure of tactics, of a whole town emptied as a military precaution (as Sherman emptied Atlanta and Burrows' brigade emptied Kandahar in 1880), of wide provinces cleared of their habitations and crops, of a thousand instances in which the provisions of Article XLVI have conspicuously not been adhered to, in later-day wars. If an invader had to comply strictly with its terms, that, of itself, would bring his invasion to an end. An invader must, and

Its limita-
tions.

¹ Holland, *Laws and Customs of War*, p. 35.

does, interfere with the lives and property of citizens in very many ways; even their religious worship and the sanctity of their churches or chapels are not secure from the encroachments of that greedy-mawed aggressor, the necessity of war. General de Voigts-Rhetz stated at Brussels that commanders could not surrender their war right to quarter troops in a church, or to requisition the property of ecclesiastical establishments;¹ and there are many instances in recent wars of churches being turned into hospitals. The fact is that this Article XLVI must be read subject to military necessities. One might add such a proviso to nearly every Article, as Baron Jomini pointed out at the Conference of 1874,² but after none is the proviso so necessary as after this. So read, the Article forbids certain violent acts unless they are demanded by the necessity of overcoming the armed forces of the enemy. Such acts must not be done as a substantive measure of war—they must not be made an end in themselves, but only a means to the legitimate end of war, that is, the destruction of the other belligerent's fighting force. To destroy property or imprison peaceable inhabitants in order to bring pressure to bear on them and to induce them to use their influence to force their legal government to submit, is absolutely contrary to Article XLVI. Instances are not wanting in which belligerents have tried to apply such illegal pressure, but every such attempt has been condemned by the more enlightened minds of the time. There is no doubt that, with all its limitations, the Article constitutes a very valuable check upon the power of the sword. But one must bear the fact in mind that there are limitations to its range and authority and very important limitations too.

The word "religion" in the *Règlement* covers all beliefs.³ "Religion." The freedom of worship secured by this article is obviously liable to restriction if it be used for the purpose of seditious propaganda or the encouragement of opposition to the occupant's government. No commander can permit the preaching of a Jeddah against him or the celebration of such emotional, *quasi*-patriotic worship as drives the people to "go fantee."

¹ Brussels B.B. p. 292.

² *Ibid.* p. 245.

³ *Ibid.* p. 292.

Confisca-
tion of
private
property.

The rule that "private property cannot be confiscated" is subject to some exceptions. One I have already alluded to—it is the case of confiscation by way of penalty—and further exceptions will be met with in the next chapter in the tactful disguise of requisitions and contributions. Another exceptional case arose during the South African War; it is hardly likely to form a precedent but it is not the less worth examining, for it illustrates some important principles of war law. On the 8th August, 1901, Lord Kitchener issued a Proclamation in which he announced that all prominent burghers of the two Republics should, unless they surrendered by the 15th September following, be banished for ever from South Africa, and that the cost of maintaining the families of such burghers should be recoverable from their property, whether landed or movable.¹ The threat of perpetual banishment has been condemned as "a flagrant violation of the laws of war, which prescribe that prisoners are to be liberated and repatriated after the conclusion of peace, with the least possible delay."² As, however, the threat was never put into execution, the question is of no great importance. But the other matter dealt with in the Proclamation is one of considerable practical interest. The maintenance of the Boer families in the Concentration Camps was a very heavy expense to the British taxpayer, whose pockets had already been drained by nearly two years of what seemed to him a quite unnecessary and hopeless struggle against the irresistible might of Great Britain. The British view—a very natural one to a mind not skilled in the niceties of war law—was that the Boer Commandants, veld-cornets, and leaders, who were responsible for the prolongation of the war, were properly chargeable with the expense involved in the maintenance of their wives, sisters, old people, and children, in the Concentration Camps. They were the natural protectors of these persons and if they chose to leave them to the enemy to feed and lodge while they themselves went gadding on commando, they were bound at least to help to pay the piper. Accordingly, hardly a voice was raised in England when the decree of confiscation was issued; the few who, like Sir William

Confisca-
tion of
Boer
farms in
1901.

¹ *Times History*, Vol. V, p. 322; De Wet, *Three Years' War*, pp. 306-8.

² Despagne, *op. cit.* p. 348.

Harcourt, protested against it, were assumed to be influenced by party motives. In January, 1902, over 50,000 acres were offered for sale in the *Orange River Colony Gazette*, in pursuance of Lord Kitchener's Proclamation, the charge against the owners being calculated on the basis of recovering the cost of rations of their families and a proportionate amount of the whole expenditure of the Concentration Camps.¹ The confiscation was, therefore, in the nature of a distraint for monies considered to be due in respect of services rendered, but that it was also in part a punitive measure is shown by its being confined to the property of the *leaders*, for the same services were rendered to the families of the rank and file of the Boer forces. In so far as it was punitive it must be pointed out that the Boer commanders were guilty of no breach of war law in continuing to resist while, in their opinion, any hope of success was left; and to confiscate their property because they did so was not within the terms of Article XLVI. Whether the confiscation can be justified on the other grounds depends on whether the existence of a *quasi*-contract can be proved making the commandants, etc., liable to the British Government for the maintenance of their families. Now the consideration that the scheme of concentration was in the best interests of the families themselves and that this was acknowledged by some of the Boer leaders at the end of the war, does not annul the truth of this, that what made concentration necessary at all was the policy which was adopted by the British as a means of ending the war. Granted that it was impossible to leave the families to starve in the midst of their ruined homes and desolated mealie-fields, devastation, concentration, expenses of maintenance, followed each other in natural sequence, and, as the Boer leaders were not consenting parties to the original act out of which the assumed *quasi*-contract logically sprang, neither can they, so far as I can see, be regarded as having made themselves liable for the costs which the support of their families entailed on the British.

Thelegitimacy of the British measures considered.

This case, like that referred to in pages 331-2 *supra*, is, I cannot help thinking, only to be explained in one way—namely, that the British authorities regarded the formal

¹ *Wynman's Army Debates*, Session 1902, Vol. I, p. 1495; Vol. II, p. 207.

annexations of the year before, together with Great Britain's old claim to suzerainty over the Transvaal (which was supposed in some way to affect its ally, the Free State, as well) as giving the Boer forces an abnormal status and warranting the application to them of a treatment not reconcilable with the strict rule of International Law.¹

Pillage. I have already spoken of the war rights respecting loot and pillage, and need not say more here.²

Taxes. The words "imposed for the benefit of the State" in Article XLVIII are intended to exclude provincial and parochial taxes, or "rates" as they are called in England.³ The latter the occupant must not intercept; he can only supervise the expenditure of such revenue, to see that it is not devoted to a hostile purpose.⁴ The first charge upon the State revenue collected by the occupant is the cost of the local administration. When this has been provided for, any surplus that remains (and a surplus is probable, since the assessment is likely to have included a proportionate charge for the cost of the central government, and during the occupation "establishment charges" are saved) may be devoted to the purposes of the occupant. In 1898, President McKinley issued instructions to General Shafter after the fall of Santiago to collect the existing taxes—"unless others are substituted for them"—and to apply the proceeds "to the expenses of the government and of the army."⁵ If, as happened when the Japanese occupied Korea in 1904, the occupant leaves the existing civil administration in power, the latter should be allowed to collect and expend the revenues.⁶ The position of Korea was an anomalous one and is hardly likely to have a counterpart in future civilised wars, but it is instructive to note Japan's admission that taxation and administration are interdependent.

New taxes must not be levied. No new taxes should be imposed by the occupant, for the imposition of taxation is, in modern times, an attribute of sovereignty.⁷ This rule was broken by the Turks in 1898 in

¹ See Despagne, *op. cit.* p. 349.

² V. pp. 188-200, *supra*. ³ Brussels B.B. p. 291.

⁴ *Manuel à l'Usage des Officiers*, p. 102.

⁵ *R.D.I.* September-October, 1898, p. 805.

⁶ Ariga, *op. cit.* p. 56.

⁷ Bonfils, *op. cit.* sec. 1189; *Manuel à l'Usage, etc.* p. 103.

Thessaly. They established the Turkish taxes on sheep, salt, and tobacco, and organised the customs on Turkish lines.¹ But if the occupant cannot create taxes, he may levy requisitions and contributions, which serve the same end. Some of the Brussels delegates wished to give him the right to place the occupied country on the same footing, as regards taxation, as his own country or as the remainder of the enemy's country which is not occupied; on the ground that the occupied part ought not to be better treated than the unoccupied, or than the occupant's country. The result of this would be that, "if the Government of the invaded country demanded great sacrifices from its people in the shape of additional taxes, the invader would have the right to raise the taxation of the occupied district to the same level." It appears to have been the opinion of the Conference that no such right could be attributed to an occupant; at all events, the Article approved by the Conference is practically the same as Article XLVIII of the Hague.²

It may happen that all the revenue and customs officials of the old government have fled on the approach of the invader, or that they refuse to serve him. In such a case, he is justified in making such alterations in the mode of recovery of the taxes and dues as will enable him to raise the same revenue as he could have raised had he had an expert collecting staff at his disposal. In 1870-1 the Germans replaced the indirect taxes in the occupied districts of France by direct taxes, assessing the latter at 150 per cent. of the old direct taxes.³ The practice they adopted is mentioned with approval in the French Official *Manuel*, which points out how impossible it is for an invader to secure the proceeds of registration, of stamp duties, and of other taxation of a complicated nature, if he is without the assistance of a *personnel* familiar with the work.⁴

By providing that the occupant is to maintain the old rules as to assessment and incidence, Article XLVIII forbids him, by implication, to raise taxes before they become due.⁵ But

¹ *R.D.I.* September-October, 1897, p. 710.

² Brussels B.B. p. 161.

³ Bonfils, *op. cit.* sec. 1189.

⁴ *Manuel à l'Usage, etc.* p. 104.

⁵ Brussels B.B. p. 242.

The existing form of collecting taxes need not be maintained.

Neither sovereign nor occupant must levy taxes prematurely.

to this obligation there is attached a corresponding right, in virtue of the same provision. If he must not levy taxes prematurely, neither must the legal government; and if the latter has called in the taxes before they were due, then the occupant is not bound to recognise the validity of the quittance. The payment made should in such a case be considered as a patriotic war contribution given by the inhabitants to their national government and not as normal taxation. The ordinary taxes remain due and may be demanded by the occupant at the proper time.¹

¹ Brussels B.B. p. 244.

CHAPTER XII

MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE—(*continued*).

(II). *Requisitions, Contributions, Fines, and the Treatment of Property.*

Conventional Law of War.—Hague *Règlement*, Articles XLIX to LVI.

ARTICLE XLIX.

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

ARTICLE L.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

ARTICLE LI.

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-Chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

ARTICLE LII.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash ; if not a receipt shall be given, and the payment of the amount due shall be made as soon as possible.

ARTICLE LIII.

An army of occupation can only take possession of cash, funds, and realisable securities which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war may be seized even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE LIV.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored, and compensation fixed when peace is made.

ARTICLE LV.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE LVI.

The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings.

Contributions of war

Usually, as I have said, the taxes of the old Government ought to be sufficient to meet the expenses of the administration of the occupied territory. But it may happen otherwise, and then the occupant is entitled to procure the necessary additional funds by means of Contributions of War—"extraordinary contributions," as opposed to ordinary taxation, to use

the term applied to them in the Report of the examining ^{their} Committee of the first Hague Conference.¹ The occupant has ^{limits} further the war right, founded on usage—for the *Règlement* confers no rights on an occupant, it only restricts and regulates those which custom gives him—of providing for the needs of his army by levying contributions from the inhabitants of the occupied territory. “The needs of his army”—these words indicate the sole legitimate object, as well as the quantitative limit, of the levy. It is unlawful for the occupant to seek, by such a method, to replenish his national treasury; any contributions imposed must be imposed to supply the wants of the occupying army. Of course there will result therefrom a saving to the occupying belligerent’s exchequer, which is thus relieved of the cost of maintenance of the army of occupation. But so long as not more than the cost of such maintenance may be exacted from the occupied territory, the extent of the contributions is kept within bounds, and as the occupying belligerent cannot be certain that he will not eventually be forced, by the fortune of war, to pay his opponent a war indemnity in which the contributions will be taken into account, he is usually led by self-interest to keep the amount of his exactions well within the regulated limits. But even with the restraints referred to, the war rights as to contributions and requisitions strike one as being peculiarly unjust and wanting in that spirit of sympathetic concern for national feeling which informs the modern usages of war so largely. It seems cruel to allow an occupant to make the enemy’s nationals contribute to the upkeep of the army which is fighting against their own. The fact is that in this matter, as in many others, there must be a certain amount of compromise, of “give and take,” between the interests of occupying armies and those of populations. It was not until quite recent years that the latter’s interests were considered at all. It is too soon, yet, to expect to see the tradition of years wiped out and forgotten. Both requisitions and contributions are, in a way, a relic of the vested rights which an invader once possessed to the money, goods, and labour of the people he had temporarily conquered. They date from the time when war supported war. To-day, their

¹ See Hague I B.B. p. 149.

Requisitions and contributions are obsolescent.

foundations are beginning to be undermined. The last Hague Conference, in making the requisitioning belligerent responsible for payment, has struck a blow at the right of requisitioning—the extreme right recognised by the jurists—which may change its whole nature, and complete a process which had already begun, of replacing requisitioning by the system of amicable purchase or at least by a right of pre-emption. Contributions, too, have become a rock of offence to many great authorities; jurists have raised their voices against this war right on the score of its injustice: the official manual of Germany, the nation which has always claimed the most elastic prerogatives in the matter of levying contributions, has had to fall into line with modern opinion in declaring illegal certain forms of contributions which till yesterday were regarded—in Germany at least—as being almost as firmly-established and respectable as marriage or monometallism. The process is still far from complete. As war law stands to-day, contributions and requisitions remain as approved methods by which an invader can procure from the enemy's citizens such funds, goods, or services as his army needs—subject, in the case of requisitions, to his paying therefor either at the time or subsequently. I shall try to show the considerations which have been held to justify such valuable privileges being attached to occupation.

Contributions and requisitions rest on the necessity of war.

It may at once be said that the reason and the justification for the privileges in question are simply the necessity of war. One may say, if one likes, that with the establishment of a state of occupation there comes into being what is practically a communistic government, having for its end the good of the invading army. That army seems almost to adopt, with a slight alteration, the Platonic formula as to the goods of friends, and to proclaim a community of goods with the important proviso that the goods are the enemy's. An armed, somewhat desperate, because hungry and battle-worn, company of feeding and fighting animals finds itself in the midst of plenty, which the "strong man armed" who once guarded it has abandoned to the foe. Given the elemental, primitive facts of humanity, is this company likely to be deterred by a paper law from helping itself? However, the provision of Article XLVI of the

Règlement may be respected by an army which is well fed and equipped, it is likely to speak with small persuasion to one that is starving, exposed to the elements, too weary with marching and fighting to think of academic rules. Therefore the army—a veritable “number and born to consume fruits”—takes what it needs, in food or money, and calls upon the people to find carriers, labourers, and artisans for its service. It would be almost a company of angels if it did otherwise. An army must live; that is the first and greatest necessity of war, and Article XLVI, of all the articles of the *Règlement*, must be read subject to that necessity. As readers of Bentham know, the starving wretch who robs the rich, abdominal baker of a loaf is punished, not because of the loss to the baker—that is nothing, compared with the thief’s necessities—but because of the ill effect which allowing a theft to go unpunished would have on the general security. Technically, he is punished for an “evil of the third order”; the “evil of the first order” (that suffered by the baker) which is involved is negligible. In war, the part of the starving man is enacted by the invading army, which has no such concern for the victim, his friends and connections, or the public security, as the philosophic judge of peace-time, alive to the various “categories of evils,” is at liberty to feel. The army—the judge in its own cause—condones the theft in view of its necessities. It steals because otherwise it would starve, and that is really about all that can be said of the matter.

But the war rights of requisitions and contributions are often availed of by armies which are in no such dire straits. The armies of rich nations have not scrupled to take advantage of the prerogatives of occupation. Sometimes, of course, it may happen that an army which is ordinarily well-supplied from its own commissariat and quartermasters’ stores, finds itself forced to resort to requisitions and contributions owing to a temporary failure in the machinery of its supply or transport departments, or simply because it has outstripped its slowly moving trains. Such a splendidly-equipped body as the South African Field Force was on short rations for a while in March, 1900, owing to De Wet’s capture of its supply train (which it had left behind in the chase after Cronje) at

Any army may have to requisition owing to temporary failure of its supply service;

or to
ensure
celerity
of move-
ment.

Waterval.¹ Celerity of movement is so important at times that an army has to abandon its wagons and to trust to finding subsistence from the country it traverses. One remembers countless instances in the Secession War in which commanders "cut adrift" from their supply trains to carry out some operation which needed despatch before everything. When Corinth fell in May, 1863, Halleck sent Don Carlos Buell to seize Chattanooga, but "marching slowly to that objective, partly because he carried his supplies with him, he was outstripped by Bragg, who lived off the country."² Grant's campaign in the rear of Vicksburg showed that it was possible to move and subsist a considerable force without taking thought for commissariat wagons. "Our army," he said, "lived twenty days with the issue of only five days' rations by the commissary."³ "The road to glory," said Ewell, the Confederate leader, "cannot be followed with much baggage," and time and again in the Civil War great marches were made and great exploits performed by armies whose whole baggage was strapped to the pommels and cantles of the cavalymen's saddles or strapped to the infantrymen's backs. The men who marched with Jackson to fight Groveton and the second Manassas had no rations save such manna-like, improvised ones as green corn, turnips, and apples.⁴ The same celerity of movement was secured by the same methods in the Franco-German War. The Prussian columns troubled themselves with no *impedimenta* save such as carried munitions of war; for food, forage, and transportation they requisitioned on the rich country through which they passed. It was this system of utilising the resources of the country, says Sheridan, who was present, that made their wonderful celerity of movement possible.⁵ Gourko's and Skobelev's Turkish campaigns of 1877-8 are further instances in point. Gourko's men lived on the country from 15th December to 25th January, only drawing their bread from the *dépôt* beyond the Danube at Sistova. Skobelev even dispensed with bread rations by the expedient of "organising

¹ *Times History*, Vol. III, p. 396.

² Draper, *op. cit.* Vol. III, p. 60.

³ Grant, *Memoirs*, p. 258; Wood and Edmonds, *op. cit.* p. 272.

⁴ Fitzhugh Lee's *Lee*, p. 186.

⁵ Sheridan, *Memoirs*, Vol. II, pp. 420-1, 447-8.

bakeries in every village along the line of march and making the peasants bake soft bread enough to last for a day or two at a time." "By the celerity and boldness of their movements war was indeed made to support war."¹ Until organic chemistry was devised something in the way of a powerfully concentrated emergency ration—some evolutionised kind of pemmican and cocoa-paste—by which men will be able to live and work hard for weeks on the contents of a few small tubes, carried on the person, or in the butt of a rifle, there will always be occasions in which an army must resort to requisitioning because of the freedom of movement it allows.

Contributions have this point in their favour, as compared with requisitions—they throw the burden more evenly and equitably over the whole town or district. At the Brussels Conference some of the delegates expressed a wish to have the levying of contributions prohibited altogether. To this proposal the German military delegate, General de Voigts-Rhetz, replied by giving the following example of what may happen in war:—

Contributions distribute the burden more evenly.

An army arrives at a rich town, and demands a certain number of oxen for its subsistence. The town replies that it has none. The army would in that case be compelled to apply to villages, which are frequently poor, where it would seize what it is in want of. This would be a flagrant injustice. The poor would pay for the rich. There is, therefore, no other expedient but to admit an equivalent in cash. This is likewise the mode which the inhabitants prefer. Moreover, it cannot be admitted that a town which is unable to pay in kind shall be exempted from paying in money.²

If the losses due to the occupant's demands are inevitable, then the system of contributions plays a useful part in "dissipating" them or spreading them over a larger area of impact. Indeed it plays the same part as the insurance company—*La Société réparatrice de l'Invasion*—which was formed at Rouen in 1870, to guarantee subscribers against such evils of war as "requisitions, pillage, and incendiarism," was meant to play. That company collapsed when Rouen was occupied by the

¹ F. V. Greene (U.S.A. Engineers), *The Russian Army and its Campaigns in Turkey in 1877-8*, pp. 370-1.

² Brussels B. B. p. 277.

German troops—an extreme eventuality with which, perhaps, the promoters had not reckoned. The premiums paid by the members were, in a way, contributions of war, except that they covered rather more than the normal contribution is meant to cover, in that they provided for war damages as well as requisitions. One may find in the incident an interesting proof of the preference of inhabitants themselves for some form of contribution rather than the unequal system of requisition which prevailed in the German armies.¹ History is so full of instances of enormous exactions made under the head of contributions that one hesitates to differ from M. Bonfils, Professor Acolas, and other writers, who condemn them on all counts and would have none of them.² Yet, so far as my view goes, they are no more objectionable than requisitions (at any rate than the old kind of requisitions) and taxation levied by an occupant, if they are resorted to only in replacement of the former, or to supplement the latter for the necessary raising of revenue for administration, as laid down in the *Règlement*. The Brussels prototype of Article XLIX provided for the occupant's demands being limited to "the necessities of war." This, says the Committee's report, was a little vague—it might have been held to justify the systematic crushing of a country by contributions.³ The present article forbids an occupant to levy contributions except for two quite definitely expressed purposes (neglecting, for the present, the case of fines). It denies him the right which has been sometimes claimed for him, of indemnifying himself for the cost and expense of the war by imposing contributions on the occupied provinces. He must no longer "count his chickens" in this way; he must wait until the conclusion of the war shall have made it certain whether he, or his enemy, is marked out by the ordeal of battle as the party at fault and as, consequently, responsible to the other for the expenses of the war. For that is really what a war indemnity comes to. Nor is the Hague pronouncement less destructive of the position taken by M. Loening and adopted by the

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 211; Sutherland Edwards, *Germans in France*, p. 266.

² Bonfils, *op. cit.* sec. 1224-1226; Lawrence, *International Law*, p. 377; Pillet, *op. cit.* p. 223.

³ Hague I B.B. p. 149.

Germans in 1870, that contributions may be used as a method of inducing a stubborn enemy to submit. The contribution of twenty-five francs per head levied by the Germans in the occupied provinces was intended to turn the French citizens against Gambetta and his policy of war *à outrance*. As M. Bonfils says, "If it is allowable to drive inhabitants to desire peace by making them suffer, why not admit pillage, burning, tortures, murder, violation?"¹ That (as I have said) the German official mind has now come to regard as illegitimate a great many of the kinds of contributions which the Prussian and German armies levied in 1866 and in 1870-1 is evident from a passage in the *Kriegsbrauch im Landkriege* which expressly denies the legality of contributions raised by the occupant for the purpose of enriching himself or recovering the cost of the war, at the expense of individuals, and authorises money levies of three kinds only, viz.—those imposed—

Psychological pressure per contributions is illegitimate.

- (1) in place of taxes,
- (2) in place of requisitions in kind;
- (3) by way of penalty.²

With the third class of contribution referred to here I shall deal presently; the other two it will be seen, conform with the Hague provisions. It is gratifying to discover that Germany has abandoned her traditional position with regard to contributions. However one may argue round the matter, there is no doubt that in past wars she employed the system (as Mr. Sutherland Edwards, no enemy of Germany, states) "to crush the occupied portion of the country and make its inhabitants long for peace." The inevitable misfortunes which war brings in its train—the cessation of employment, the dislocation of trade, the distress, suffering, starvation—are bad enough without having this unnecessary cruelty added to them.³

It will be very interesting to see what effect the addition made to Article LII at the last Hague Conference has upon the practice of levying contributions and requisitions in future wars. That addition makes the belligerent who levies requisitions responsible for payment being made either on the spot or

Possible effects of the new provision as to payment for requisitions.

¹ Bonfils, *op. cit.* sec. 1222.

² p. 63.

³ *Germans in France*, p. 61.

"as soon as possible." At first sight, the effect of this provision would seem likely to be that contributions would replace requisitions almost entirely; for as the occupant must meet his requisition receipts, at some time, in cash, his best policy would appear to be to raise from the districts he has occupied the money to pay for whatever goods or services he requires and so avoid opening his national purse-strings. Indeed, Baron Jomini raised this very objection to Baron Lambert's proposal at Brussels that requisitions should be paid for either on the spot or subsequently, that "the inevitable end would be that the war contributions of the conquered would be increased."¹ It is noticeable that in the last edition of the British *Field Service Regulations* (Part II, *Organisation and Administration*, 1909), a new provision as to levying contributions appears, which is at variance with British practice in all wars since the American War of Revolution. The provision I refer to authorises commanders to raise contributions, "in order to distribute the burden of levying supplies more evenly over the population," for "otherwise it is only the inhabitants immediately on or near the line of march who feel it." "By levying contributions," the paragraph [37, (2)] goes on, "in large towns, which are principal administrative centres of districts, and expending the sums so obtained in the purchase of supplies in outlying districts, the latter may be made to bear their share as well." As I shall show just now, Great Britain has abstained from raising contributions in her recent wars; does the paragraph I have quoted indicate that her policy in this respect is to be reversed, and is it a mere coincidence that the reversal of policy (if such it be) follows so closely upon the Hague amendment of 1907? It may, of course, happen that the words "as soon as possible," in the *Règlement* will be interpreted loosely and that, as in the past, the charges for requisition notes will be met by the defeated belligerent, either as part of or in addition to the war indemnity. Personally, I think no great change will result from the new provision. Whatever rights an occupant has had in theory, there has been a steady tendency since 1871 to substitute purchase for requisitioning—in the sense of obtain-

Unlikely
that any
great
practical
change
will
result.

¹ Brussels B.B. p. 276.

ing supplies or services in return for a receipt to be honoured at the end of the war by the defeated party, not necessarily by the giver—and to do away with contributions altogether except as a punitive measure. This tendency will be strengthened by the Hague addition, and a practice which has become all but universal will in future be entirely so. I shall try to trace the stages through which this practice has passed, and to show how the methods of the great wars of 1861-5, 1866, and 1870-1, have been replaced by others which are at once milder and more business-like and efficient.

The bed-rock of the matter is that an army, operating in a hostile country, or even garrisoning an occupied country, very rarely finds it possible to subsist without utilising the resources of that country. "No army," said the German delegate at Brussels, "can subsist during the campaign on the resources of its own magazines." And it is wise, even when it is not absolutely necessary, to utilise a country's resources. If a commander can obtain from the country he is operating in such bulky supplies as corn, fresh meat, vegetables, hay, he relieves his transport, perhaps over a lengthy line of communications, to a very considerable degree. It is cheaper, too, usually, to purchase locally, and better for the health of the troops. Campaigning fare is proverbially hard and scant. Soldiers grumble at army rations—"desecrated vegetables and consecrated milk," Sherman's soldiers called the tinned supplies; "dog-biscuits and iron-filin's," was Private Mulvancy's description of the British Indian Service ration. In the last resort, when all has failed, men will eat anything and joke about it, Mark Tapley like; the men who stood the siege of Paris even proposed to eat the Ministers—"in a spirit of love"—as soon as the devilled puppy and *salmi* of rats were all exhausted; the humour of the Ladysmith soldiers survived a diet of stringy, remounts, and came up smiling to boast of having "eaten three cavalry regiments." But though men fight grimly, *in extremis*, on the poorest fare, it is unquestionably true that, as a great soldier once said, an army moves and fights on its belly, and that, other things being equal, the better-fed army will always overmatch a rival less fortunate in this respect. It is a

It is necessary to utilise the resources of an invaded country.

question of *moral*; there is a close connection between the spirit of an army and the state of its biliary glands. It is very sound policy, for a good many reasons, even when it is not absolutely necessary, for a commander to utilise the resources of the theatre of operations.

The system of requisitioning pure and simple—no liability for payment being under-taken by the requisitioners.

The practice of the Secession War.

If, then, supplies must be obtained locally, the question arises, how best to secure them speedily and in abundance. One school—the school of the sword, one might call it—would say—"Requisition with all your might and leave the inhabitants to grin and bear it"; or else, "Requisition and give the inhabitants receipts which will be met by the defeated belligerent." This school put its principles into practice in some great wars—the last being the Franco-German, in which, it may be said, the practice received its death-blow. Gratuitous requisitioning was tried on a large scale in the American Civil War. Sherman's orders for the march to the sea, issued on 9th November, 1864, instructed the army to "forage liberally on the country during the march"; brigade commanders were directed to send out foraging parties, under an officer, to collect forage, meat, vegetables, corn-meal, or "whatever is needed for the command." "In all foraging, of whatever kind," the order concludes, "the parties engaged will refrain from abusive or threatening language, and may, when the officer in command thinks proper, give written certificates of the facts, *but no receipts*; and they will endeavour to leave with each family a reasonable portion for their maintenance."¹ Sherman's orders were approved by the Washington War Department.² The orders which Hunter received from Grant, and which he handed over to his successor, Sheridan, relative to the operations in the Shenandoah Valley, concluded in these words:

Make your own arrangements for supplies of all kinds, giving regular vouchers for such as may be taken from *loyal citizens* [*i.e.*, Union sympathisers only] in the country through which you march.³

The Secessionist commanders adopted a different line in their

¹ Sherman, *Memoirs*, Vol. II, pp. 174-6; Draper, *op. cit.* Vol. III, pp. 319-20; Bowman and Irwin, *Sherman and his Campaigns*, pp. 265-7. See an interesting paper by Daniel Oakey in "*Battles and Leaders*"—*Century Magazine*, Vol. 34, p. 919 ff.

² Sherman, *Memoirs*, Vol. II, pp. 128-9.

³ *Ibid.* p. 465.

northern raids of 1862 and 1863. They paid for everything they required either in cash or in Confederate notes—then not much depreciated—but their action was based on policy, for they hoped to win over the people of Maryland and Pennsylvania to the southern cause.¹ In the later raids they shaved themselves much less careful to conciliate the inhabitants and levied requisitions and contributions—the practices of gratuitous requisitioning and of raising money contributions have usually gone hand in hand—with the irresponsible freedom which the current usage of war allowed. Jubal Early burnt Chambersburg because it refused to comply with a demand for “ransom.”²

In the Seven Weeks' War, contributions and requisitions were levied very freely by the Prussian army. The town of Frankfort was called upon to pay £600,000, and after this sum had been handed over, an additional £2,000,000 was demanded but subsequently remitted by the King of Prussia, to whom the town sent a deputation praying to be relieved of this enormous imposition. About two millions of rations were also exacted from the town.³ In other towns, too, even the German Professor Bluntschli has to confess, “the Prussians raised contributions in money without adequate reason.”⁴ The supply system which the Prussians followed in this war is thus described by Hozier. (The “magazines” he refers to are those which were established in places where the provision wagons and forage carts could conveniently reach them.)

The practice of the Seven Weeks' War;

These magazines were constantly replenished both by food and forage brought by railway from the interior of Prussia, or by requisitions levied on Saxony and Bohemia of food and forage, for which the Commissariat paid by cheques which the fortune of war afterwards allowed to be defrayed from the war contributions paid by the Austrian and Saxon Governments. Had the fate of arms been different, of course Saxony and Austria would have provided that these cheques should be honoured by the Berlin Exchequer.⁵

¹ As to the Antietam campaign, see Draper, *op. cit.* Vol. II, p. 452; as to the Gettysburg campaign, see *Century Magazine*, Vol. XXXIV, p. 152, where Lee's Order of 22nd June, 1863, to Jeb Stuart is quoted; and Battine, *Crisis of the Confederacy*, p. 139.

² *V. supra*, p. 131.

³ Hozier, *Seven Weeks' War*, p. 311.

⁴ Bluntschli, *op. cit.* sec. 654.

⁵ Hozier, *Seven Weeks' War*, p. 80.

and of the
Franco-
German.

The German methods of supply in the war of 1870-1 were a compromise between the buccaneering system of 1795-6 and the "ready-money" system of later days. Enormous requisitions were levied, especially when the troops were moving into France. Huge contributions, too, were imposed on the towns. Orleans had to find a million francs for General von der Tann in October, 1870, as well as 600 cattle, 300,000 cigars, and billets for the German soldiers.¹ It was Bismarck's policy, throughout the war, to raise money and supplies as far as possible by levies upon the French people and thus to avoid the necessity of asking the Reichstag for fresh funds to carry on the war.² At first the invaders practically lived upon the country. The 3rd and Meuse armies, advancing to Paris, got so much bread by requisition that it was found possible to cancel the regular bread contracts.³ And not only were large requisitions in bulk imposed upon the civil authorities of the French towns and villages, but by the system of billeting the French householders were forced to be the unwilling hosts of their conquerors. The ration in billets was a generous one, compared at least with the English European ration (value about 8*d.* or 9*d.*, including messing). It consisted of about 1½ lb. of bread, over 1 lb. of meat, over ½ lb. of bacon, a little coffee, tobacco or cigars, and wine or brandy. The cash equivalent was at first 2 francs, but after the Peace this was reduced to 1¾ francs.⁴ It was found, however, in this war, as it had been found in the American Civil War,⁵ that if requisitioning was a good way to supply a moving army, it was not so when the army halted for any length of time. In October, 1870, the army of the Meuse abandoned requisitioning for purchase. A Proclamation was issued at Beauvais, inviting the French farmers to bring in their produce to the German Intendance, which would buy it from them at prices to be agreed upon.⁶ The 3rd Army, too, while investing Paris, made

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 84.

² Busch, *Bismarck*, Vol. II, p. 260.

³ German *Official History*, Part II, Vol. III, p. 212.

⁴ Sutherland Edwards, *op. cit.* pp. 51, 54; De Martens, *op. cit.* p. 340; German *Official History*, Part II, Vol. III, pp. 218-9.

⁵ Porter, *Campaigning with Grant*, p. 293.

⁶ Cassell's *History*, Vol. I, p. 201

purchase the rule and resorted to requisitions only in exceptional cases.¹ But even with the increased supply which the system of purchasing produced, the investing army had to depend mainly on the supply trains from Germany for its provisions and forage. In some Departments, the French prefects forbade the inhabitants to sell food to the Germans on any terms, and though the offer of cash payments usually succeeded in securing whatever supplies were on the market, it was at once apparent that the investing troops would have to rely very largely on the supplies transported from across the Rhine.² Everything possible was done to tap the local supply sources, but it was found by experience that "requisitioning was of but trifling use in providing for the wants of an army," and that, whatever prices were offered, the support of over 700,000 intruding guests was too great a strain for an already exhausted country. "Throughout the war, therefore, Germany was the main base of supplies for her army."³

The "requisition receipts" (*bons*) which were given by the Germans in 1870-1 were worded as follows:—

Payable by the French Government, or by the German Government, according as shall be agreed between the two Governments.⁴

The requisition receipts of the Franco-German War.

They were eventually paid by the French Government, together with compensation for contributions and other war losses, but only as an act of grace and without the admission of any legal liability. The Germans would not admit the French contention that the amount of the contributions raised—39 million francs—ought to be deducted from the war indemnity of 5 milliards of francs imposed on France by the Peace Treaty.⁵

So far for the practice of "the school of the sword." One comes now to the other school—"the school of the purse." The maxim of this school has been "Pay value for what you want just as you would in peace time," and in pursuance of

¹ German *Official History*, Part II, Vol. III, p. 213.

² Hozier, *Franco-Prussian War*, Vol. II, p. 85; German *Official History*, Part II, Vol. I, pp. 98-9.

³ Hozier, *op. cit.* Vol. II, p. 243.

⁴ Bontils, *op. cit.* sec. 1223.

⁵ *Ibid.* sec. 1221.

The system of raising supplies by giving cash or negotiable receipts therefor.

The practice of the South African,

Spanish-American,

Russo-Turkish,

this policy it has refrained from levying contributions as a method of supporting armies. In all wars, as I have said, there are occasions when requisitioning must be resorted to. What distinguishes the "school of the purse" is that, in the main, it has paid in cash, or in drafts *which the drawer undertakes to honour*, for whatever is requisitioned from the enemy's nationals. Indeed in some wars, requisitions, as opposed to cash purchases, have not been in evidence at all. France has not employed them in her recent wars, nor did England in the Crimea, and only to a very limited extent in the South African War. In that war, requisitions were paid for by Army draft, readily negotiable in cash, in the great majority of cases. In some cases the supplies requisitioned were not paid for, but that was because the owners were assumed to have done something meriting punitive treatment; and though their offence was often simply absence on commando, and therefore, in the eyes of International Law, a questionable offence, the fact that it was regarded as an offence by the British authorities removes such cases from the category of requisitions into the category of *fines* . The United States used requisitions very sparingly in the war with Spain, and only within very restricted limits; and no contributions were levied in that war, any more than in the South African, although General Merritt threatened to impose one on Manila if the people offered resistance after the occupation.¹ In 1877-8 the Russians paid in hard cash or "credit notes" (cheques) for everything they required from the Turkish subjects.² An English correspondent who was with the Turks in Thessaly in 1897 relates that "even the most ordinary rights of war were not resorted to, and the sheep and oxen bought by the Turks, at any rate at that stage of the campaign, were paid for in hard cash"; the German *attaché*, Colonel von Sonnenberg, was almost scandalised by the unorthodox honesty of the Turkish supply officers.³ In some cases, the invading Turks appear to have taken supplies without any acknowledgment, not to mention payment, but for the most part they gave receipts, payable by the

¹ *R.D.I.* September-October, 1898, p. 811.

² De Martens, *op. cit.* p. 343.

³ Clive Bigham, *With the Turkish Army in Thessaly*, p. 63.

Ottoman Treasury, for whatever they took.¹ Japan hardly resorted to requisitioning (in the narrower sense) at all in her war with China. The regulations on the subject which Marshal Oyama issued to the 2nd army provided for supplies being paid for in local currency, and it was only when it was impossible to effect payment at once that requisition notes were to be given.² The peculiar situation, internationally, of the theatre of hostilities in the Russo-Japanese War impairs the value as precedents of the requisitioning arrangements made by the Japanese authorities. Still, as Professor Ariga says, "an army must always have the power to feed itself, wherever it is, and it is often impossible to transport the necessary supplies from its own country." It was a question of the raising of supplies, and Japan, as might have been expected, chose the most effective and business-like method. She availed herself of the right of requisitioning, but in the milder, more modern, form. She paid for all supplies in military *assignats* or credit notes, which could be exchanged by the holders for bullion held by each army and each division in its treasury chest. The total value of the *assignats* put into circulation exceeded fourteen millions sterling.³

It will be seen from the above historical review that the tendency to adopt purchase in lieu of requisitioning as a method of obtaining supplies has been a marked one in recent wars. The fact that great business nations like Great Britain, the United States, and Japan have not availed themselves of the old and valuable prerogatives of occupation, the raising of contributions and of requisitions chargeable to the defeated belligerent, is not to be explained on any other hypothesis than that those prerogatives are less valuable than they appear. The fact is that they are, at their best, unsatisfactory methods of supplementing service rations. They are less suitable for a halted army than a moving one, but even for a moving army there is always the danger of the country in front being devastated—a danger that is far greater than when purchase is the rule. Purchase is the only way to tap the supply sources

Chino-
Japanese,

Russo-
Japanese
Wars.

Paying for
supplies
in cash or
drafts is
better
policy
than the
old system
of requisitioning.

¹ *R. D. I.* September-October, 1897, p. 706.

² See the Regulations I refer to in Takahashi, *op. cit.* pp. 155-160.

³ Ariga, *op. cit.* pp. 450-2.

The
evidence
of the
Crimean
War :

and of the
Secession
War.

of a country. The great economic law of supply and demand is as powerful in war as in peace. Not all the proclamations, foraging columns, martial law punishments in the world will create a supply of commodities as well as the offer of a fair price for them. England proved the truth of this statement in the Crimea. "The English system of payment for supplies," says Kinglake, "rapidly began to bear its usual fruit and the districts from which the people came in to barter with us were every day extending."¹ "The country people," says Russell, "are decidedly well inclined to us. Of course, they were rather scared at first, but before the day was over they had begun to approach the beach and to bring cattle, sheep, and arabas for sale."² At first there were difficulties at Eupatoria—as there were again in the war of 1866—owing to the first English officers who landed forgetting that English coins would be looked at askance by the inhabitants, but as soon as a supply of Russian money was obtained, there was no difficulty here or in the Crimea in obtaining supplies in plenty.³ Money has a magic power of unlocking secret stores. The American Secession movement failed in the opinion of that shrewd observer and former Quartermaster-General, U.S. Army, J. E. Johnston, because "supplies, instead of being honestly raised, were impressed by a band of commissaries and quartermasters, who only paid one-half the market value. As might have been expected, this was enough to prevent their getting anything."⁴ And this, be it remembered, was in the south—the home and heart of the Confederacy, passionately devoted to the cause for which Lee and Johnston fought—and not in a hostile land. Longstreet saw the difficulty and the solution when he advised impressing gold throughout the southern States. "If you could give us gold," he wrote to Lee in February, 1865, "I have reason to believe that we could get an abundant supply for four months, and by that time we ought to be able to reopen our communication with the south" (interrupted by Sherman's operations).⁵ His suggestion was not taken and the Con-

¹ Kinglake, *Crimea*, Vol. II, p. 352.

² Russell, *Crimea*, p. 166.

³ Kinglake, *Crimea*, Vol. II, p. 326.

⁴ Swinton, *Army of Potomac*, p. 572.

⁵ Longstreet, *From Manassas to Appomattox*, p. 646.

federacy fell. Its fall—though other causes contributed to it, too—was assuredly due in a large measure to the cause which Johnston assigns to it: it is, I think, a perennial object-lesson for those incurious who do not see that supplying an army, even in war time, is a matter of business, and that to do it efficiently, business methods, and not force, should be employed.

It is now pretty generally held that the old forcible methods of impressing supplies were faulty in more ways than one. They caused dissatisfaction and discontent in the occupied territory, and they failed to achieve their object—the obtaining of supplies speedily and in abundance. The latter is, in war time, the great object to be held in view, and, whatever supply system attains it best, is the system that will naturally recommend itself to those who have had practical experience of various methods. "When we pay cash," said Bismarck in 1870, "enough always comes upon the market and cheaper than in Germany."¹ "As far as possible," says Professor Ariga, who went through the 1904-5 war, "the needs of the army ought to be provided for by means of free purchases, for then only will the inhabitants sell their goods and at a price freely agreed upon."² "Supply officers," says the French *Bulletin Officiel* relative to Field Service (p. 84), "should never lose sight of the fact that it is best, in order to control or secure the local resources, not to have recourse to requisitions except in default of all other means, such as direct purchase or amicable agreement." "Cash payments," the British *Requisitioning Instructions* (paragraph 11, note) lay down, "generally ensure a more plentiful and regular delivery of supplies, and enable the inhabitants to replenish their stocks, which may be greatly to the subsequent advantage of the Army." The old fable of the goose that laid the golden eggs is one which the wise commissariat office ought to keep constantly in mind. Blustering methods of intimidation are well enough in their place but they are apt to defeat their own end when employed in such a delicate operation as opening, fostering, and extending the sources of supply of any required commodity.

Purchase is the only way to tap the supply sources of a country.

Apparently the earlier school of requisitioners thought that

¹ Busch, *Bismarck*, Vol. II, p. 260.

² Ariga, *op. cit.* p. 451.

Payment
for requi-
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The
Brussels
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sion.

War loans
have made
payment
for requi-
sitions
possible,
even by
a poor
nation.

forceful methods were the only feasible ones. They thought it was Utopian to expect an invading army to subsist without levying requisitions which were practically gratuitous and contributions which were entirely so. One finds evidence at the Brussels Conference that even then some minds were dissatisfied with the muzzy principles which ruled the usage regarding levies in money and kind. The Belgian delegate was especially disposed to question the divine right of irresponsible seizure. He pointed out that the receipts given for requisitions were "much discredited in public opinion," and he proposed that all requisitions should be paid for in cash or in a receipt, rendering the giver responsible for payment. He was thirty-three years before his time. The Swiss delegate had the honour of expressing opinions equally premature and enlightened. The Conference could not be persuaded that the proposals of these delegates were practicable or even necessary. "If the receipt," said the German military delegate, "has no value, it is because the Government of the occupied country gives it none. Therefore, if you require that receipts shall be paid, you compel the Government to recognise a forced loan of which it knows nothing. . . . Who could distinguish between a genuine and a false receipt? Receipts are written more often than not in haste and with pencil: it is impossible to bind a Government to recognise them all."¹ His words, with their manifest insistence upon unessential, subsidiary things, were accepted as wisdom undefiled. One is surprised to find Mr. Sutherland Edwards declaring that to renounce the right of levying unpaid requisitions would be, for the great military Powers of the Continent, to renounce the right of making war. "How," he asks, "during this last war [the Franco-German] could her portion of such an expenditure have been borne by Bavaria—who, on war being declared, had to borrow ten millions of thalers from Prussia?"² Yet there were such things as war-loans in existence in 1870, and huge masses of floating capital waiting on the call of any needy nation, especially a nation whose success in war seemed assured. It may be impossible, as Professor Pillet remarks,³ to oblige an invader to pay on the spot for

¹ Brussels B.B. p. 279.

² *The Germans in France*, p. 292.

³ Pillet, *op. cit.* p. 233.

everything he takes—one cannot expect an army to starve because it has no immediate funds—but there has been in recent wars, and will be in future ones, nothing to prevent an invader pledging his credit and recovering his expenses at the end of the war in the shape of an indemnity from his opponent. He need not “pay as he goes,” but there is no necessity for him to make unfortunate peasants and shopkeepers suffer for his lack of funds. *Noblesse oblige*, and if a civilised nation cannot pay its way in war—on borrowed money, if necessary—it should not go to war at all. Individuals suffer enough in war without losing their property in return for a piece of paper which may or may not be negotiable months or years afterwards. The Hague Conference of 1907 (after an abortive endeavour to the same end had been made at the first Conference) has approved the truth and justice of what I have said. Of course, as the conventional law of war stands, a nation may still make its adversary’s nationals pay for the privilege of being over-run in the shape of contributions, which remain a charge upon the subscribers. But here also *noblesse oblige*, and a Sovereign Power which has drawn the sword in a just cause should think it shame to squeeze the money it needs for its operations from the already hard-hit and suffering population whose territory its armies have occupied. Besides, it is not to get money for nothing to raise it at the price of disaffection, distress, and smouldering revolt; and if a contribution is considerable enough to be worth raising at all, it may cause all this. As I have said the tide has set against the practice of levying contributions. The old “war-scot” is moribund, except in the form of levies for the necessary expenses of administration. The Hague *Règlement*, it will be borne in mind, does not legalise contributions; it only sets bounds to the war right which the usage of war gives, and the usage of war is tending more and more to dispense with contributions. It is fairly safe to predict that the civilised wars of the future will be marked by a restraint and a moderation as regards levies both in money and in kind which will tend more than anything else possibly could to mitigate the lot of non-combatants.

Contributions, it will be noticed, can only be demanded on the authority of the Commander-in-Chief and on his written

Contributions require the authority of the Commander-in-Chief.

order. Requisitions, on the other hand, may be made on the authority of the officer in command on the spot, whose orders need not be in writing. "Military necessities," says the Report of the Committee of the first Hague Conference, "are opposed to demanding for ordinary daily requisitions a higher authority than that of the officer on the spot, and, as to a written order that would be superfluous in view of the necessity for giving a receipt."¹

What may be requisitioned?

What may be requisitioned? Practically everything under the sun. In the Franco-German War, requisitions were made for horses, oxen, sheep, coffins, horse-shoes, fuel, cloth, boots, socks, every imaginable thing. In the important towns the Germans requisitioned printing offices, type, printing presses, and the services of printers and compositors. Luxuries were supposed to be paid for, and insignificant requisitions were "not according to Cocker," but in neither case was the rule always adhered to. Mr. Sutherland Edwards says he knows of a boot-jack having been requisitioned, and at La Besace, he found a requisition for six eggs, in the following terms:

Requisitioned, for the staff of the 5th Army Corps, six eggs—
Lieutenant , La Besace, Aug. 30, 1870.²

The British official *Instructions for Requisitioning* (paragraph 11) speak of supplies, stores, material, animals, vehicles, labour, accommodation, as the usual objects to be requisitioned. The requisitioning regulation which Marshal Oyama issued in the Chino-Japanese War contained the following rule:

Requisitions are to be limited to objects essential for the subsistence or lodgment of the troops, or the discharge of fatigue duties, works of transport and organisation of services for the transmission of messages. If it is necessary to requisition anything not here enumerated, the sanction of the Commander-in-Chief must be obtained.³

¹ Hague I B.B. p. 150.

² *The Germans in France*, p. 124; see also pp. 50, 54, 57; and Hozier, *Franco-Prussian War*, Vol. I, p. 401.

³ S. Takahashi, *Cases on International Law during the Chino-Japanese War*, pp. 155-160. For a list of the objects and services which may be requisitioned under French Law, see Bonfils, *op. cit.* sec. 1211.

As regards the "services" which may be requisitioned, General de Voigts-Rhetz explained them at the Brussels Conference as including "services performed by drivers, farriers, smiths, carpenters, and, generally speaking, by all workmen of whatever trade they belong to." He pointed out, however, that the services demanded must not be such as to oblige the inhabitants to take part in warlike operations.¹ At the same Conference, the Swiss delegate drew attention to the hardships which would result from allowing an invader to seize the small boats of the inhabitants where, as in Switzerland, they form the sole means of communication between localities. The Committee of Conference, to satisfy him, inserted the following rather harmless *vœu* in the Protocol: "In cases where boats are the sole necessary and indispensable means of communication, the opinion of the Committee is that the occupier should have regard to the exigencies of the ordinary mode of living (*la vie publique*)." As the German military delegate observed, an occupant has as much right to requisition boats as the carts of kitchen gardeners or contractors.² The case which the Swiss delegate raised is one of many in which the requisitioning of boats, vehicles, or property may result in peaceable citizens being deprived of their only means of living: yet in such a case the invader's military exigencies make the requisitioning imperatively necessary. Not only may he need the boats, etc., for his own purposes, but it may be a matter of vital importance not to leave them for the enemy to use. When the Japanese reached the Yalu river in April, 1904, they found plenty of Chinese and Korean junks in which to cross; the Russians had not troubled to remove them from the south shore and the attacking Japanese forces reaped the benefits of their opponents' neglect or mistaken consideration for the inhabitants, whichever it was.³

The requisitioning of boats.

Requisitioning and the levying of contributions should ordinarily be carried out through the medium of the civil authorities. The German *Field Service Regulations* (paragraph 451) instruct requisitioning officers to invoke the assistance of the chief civil authorities or other leading inhabitants, in order

¹ Brussels B.B. p. 274.

² *Ibid.* p. 246.

³ T. Cowen, *Russo-Japanese War*, p. 238.

Requisitioning should be carried out through the medium of the local civil authorities.

to avoid direct requisitioning by the troops and the consequent danger of plundering.¹

In 1904-5 the Japanese requisitioned upon the "chambers of commerce"—a sort of urban council—which existed in the Chinese villages, and these "chambers" found the vehicles, coolies, etc., which were demanded, thus acting as a "buffer" between the troops and the inhabitants.² Direct contact between the two last-named elements was still further prevented by the Japanese institution of "commissioners of administration," of whom I have spoken in the last chapter. In the Franco-German War, the "Maire" was made the medium of communication; an indent was sent to him for so many rations, carts, horses, etc., and he distributed the burden as evenly as possible over the townsfolk.³ Where there were no civil authorities, requisition notes were delivered directly to the inhabitants. It was the same in the Secession War; the local authorities were used as intermediaries wherever possible, but where none existed, direct "foraging" was resorted to. When Sherman marched through Georgia to the sea, he found that

Direct requisitions must be made where there are no civil authorities.

the country was sparsely settled, with no magistrates or civil authorities, who could respond to requisitions, as is done in all the wars of Europe; so that this system of foraging was indispensable to our success.⁴

In order to make his levies as fair as possible, he used the statistical returns of the State.⁵ The S. Carolina Cavalry leader, Wade Hampton, protested against Sherman's methods and—whether by Hampton's orders or not is uncertain—some of Sherman's foraging parties were murdered in cold blood, and labelled "Death to all foragers." Sherman thereupon addressed a minute to Hampton, in which he maintained his war right to requisition, and threatened reprisals for the murders.

If the country will supply my requisitions (he went on), I will forbid all foraging; but I find no civil authorities who can respond

¹ See also French *Bulletin Officiel, Service des armées en Campagne*, p. 84; *Kriegsbrauch im Landkriege*, p. 54.

² Ariga, *op. cit.* pp. 431, 459.

³ Hozier, *Franco-Prussian War*, Vol. I, p. 401.

⁴ Sherman, *Memoirs*, Vol. II, p. 183.

⁵ *Ibid.* p. 32.

to calls for forage or provisions, and therefore must collect directly of the people.¹

Requisitions must be limited to "the needs of the army of occupation," not necessarily to the needs of the troops on the spot. Therefore, there is nothing necessarily illegitimate in the French official regulation which empowers a commander to requisition rations for more than his actual numbers, in order to mislead the enemy as to his strength.² The Germans appear to have employed a ruse of this kind in 1870-1.³

In the levying of requisitions, humanity demands that a population shall not be despoiled to such an extent as to reduce it to starvation. "The usual practice," says a paragraph in the British *Field Service Regulations* (Part II, p. 63), "is to leave at least three days' supply of food for a household, and rather more than this at outlying farms or villages." *The Instructions for Requisitioning* (paragraph 6, note) supplement the above regulation by laying down, as a minimum to be left, "a week's supply of food for man, with a fortnight's forage for beast, at outlying farms or agricultural centres." Commanders have usually adopted a commendable attitude in this matter. The Crown Prince of Prussia informed the people of Lorraine that all he asked of them was "the surplus of provisions over what is necessary for the French people."⁴ Marshal Oyama instructed his requisitioning officer in the Chinese war to take into account the competence of the inhabitants to supply what was demanded.⁵ The practice of levying requisitions through the medium of the civil authorities makes for equitable treatment of the population in this respect. The authorities are aware of the capacity of their charges and will not fail to represent any cases of exorbitant demands; and such representations will always be patiently listened to by humane commanders.

How can the levying of requisitions and contributions be enforced? The German plan in 1870-1 was to increase the

¹ Bowman and Irwin, *Sherman and his Campaigns*, p. 355.

² *Bulletin Officiel, Service des Armées en Campagne*, p. 86.

³ Edwards, *Germans in France*, p. 270.

⁴ Hozier, *Franco-Prussian War*, Vol. I, p. 401.

⁵ Takahashi, *op. cit.* p. 159.

The means
of en-
forcing re-
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tribu-
tions.

amount demanded if it were not immediately forthcoming, and then, if the inhabitants still proved recalcitrant, to bombard and burn the town or village.¹ Usually it was found unnecessary to go to the latter extreme. The people of Orleans professed to be unable to find more than half of the amount of a contribution levied upon them when the city was occupied the second time by the Germans, and they offered plate and other articles in liquidation of the deficient moiety. The Bavarian commander replied that he was a general, not a storekeeper, and that the contribution would be increased by £4,000 a day until the whole was paid. The threat was effective and on the same or the following day the original sum demanded was paid over.² Often hostages are taken to secure compliance with levies in money or kind. There is said to be a usage forbidding the captor to take their lives,³ but against this alleged limitation the incident of the Franco-German War to which I have already referred in a different connection, when the commandant of Nancy threatened to shoot a number of workmen if a requisition for services were not complied with, furnishes practical rebutting evidence.⁴ The action of the German commandant in this case has been condemned by practically all jurists—including German writers like Geffcken⁵—but it has the approval (for what it is worth) of the German General Staff Jurist.⁶ Capital punishment is unquestionably a drastic method of securing the filling of a requisition, but seeing that bombardment is admitted (by International Convention for maritime war, by the Institute of International Law for land war) to be a legitimate mode of coercing a town which refuses to comply with a proper demand of the kind, it can hardly be said dogmatically that, given extreme circumstances and the failure of all other means, the infliction of even this extreme coercive penalty is forbidden by the usage of war. If it is contrary to Article XLVI to take a prominent citizen in such a case and shoot him, it is equally contrary to that article to bombard his

The ques-
tion of
executing
hostages
taken as
security
for requi-
sitions.

¹ Busch, *Bismarck*, Vol. II, p. 249.

² Hozier, *Franco-Prussian War*, Vol. II, p. 199.

³ Hall, *International Law*, pp. 415, 475; Lawrence, *International Law*, p. 345.

⁴ *V. supra*, p. 151.

⁵ Bonfils, *op. cit.* sec. 1150.

⁶ *Kriegsbrauch im Landkriege*, p. 48.

house and kill him—and most likely his wife and children—incidentally, with the same object. It is really only a difference between killing a man with a rifle and killing him with a piece of ordnance. But except in certain very extreme circumstances such a measure would be quite unnecessary. It is the experience of history that an occupant can usually seize, in land war, what he wants; and if he cannot, the threat of either carrying off the prominent citizens as prisoners of war ("hostages") or of burning down a few houses, usually suffices to bring the people to terms.

Purchase is, as I have shown, the accredited method of obtaining supplies in present-day war; but purchase means purchase at a certain price, and here a difficulty comes in. Prices run high in war and if the ordinary economic laws of peace time are allowed to reign undisturbed, the occupant may find himself the chief sufferer from a market condition which he has created. Both traditional practice and fairness demand that some limit shall be placed to the monopoly—for such it is, practically,—which the body of inhabitants possesses as against the other party to the bargain, the occupant. The latter usually fixes a fair price, detailed in a tariff, at which supplies are to be purchased, and demands for a higher price are punished under martial law regulations. It was so in the Russo-Japanese War. A "strictly reasonable" price was laid down for each commodity and any demand for a higher one was punished.¹ The requisitioning regulations issued by Marshal Oyama in the war with China provided that requisitions should be paid for "at a rate deemed appropriate, though not necessarily so large as to obtain the consent of the owners of the requisitioned articles."² In the Anglo-Boer War, tariffs of prices were published from time to time, and no higher price than that laid down therein was allowed. The British *Instructions as to Requisitioning* (paragraph 13) provide that no increase in value by reason of the existence of military operations should be allowed. Were inhabitants allowed to skyrocket prices at their own sweet will, the self-interest of belligerents would compel them to reconsider their attitude on

In purchasing, the occupant may fix the prices.

¹ Ariga, *op. cit.* p. 457.

² Takahashi, *op. cit.* p. 159.

the whole question of payment for supplies, which is, after all, but a very modern concession.

Collective
punish-
ment.

Collective punishment usually takes the form of a pecuniary levy or fine; but, although Article L appears among the provisions relative to levies in money or kind, and the treatment of hostile property generally, it was intended to, and does in terms, apply to any kind of collective punishment.¹ Of all the punishments used by war law, fines are the commonest and in many ways the most satisfactory and humane. They are, says the German *Kriegsbrauch im Landkriege* (p. 63), the most effective way of bringing a civil population to book. But they are a form of punishment which needs to be used with the greatest discretion and care. Bluntschli admits that the Germans stretched their war right of collective punishment altogether beyond its proper limits in 1870-1.² A system of collective responsibility was established, which made not only the *commune* in which an offence was committed, but also that from which the delinquent came, liable for the offence.³ It is this practice which the Hague Article aims at prohibiting; its intention is to confine collective punishment to such offences as the community has either committed or has allowed to be committed.⁴ Two important reservations to this general statement must, however, be made. First, the act punished need not necessarily be a violation of the laws and customs of war; this is clear from the debate at Brussels.⁵ Any breach of the occupant's proclamations or martial law regulations may be punished in this way. Secondly, the provision of Article L does not prejudice the question of reprisals.⁶ Consequently collective punishment may be inflicted in such circumstances as warrant the infliction of reprisals (as to which later). There is nothing unfair in holding a town or village collectively responsible for damage done to railways, telegraphs, roads, and bridges in the vicinity; it is the practice in all wars. If a city bridge is broken down in peace time, the municipality will not hesitate to repair it, for the public use; the cost is thrown on the rates, the increase in which may be regarded as a kind of fine. In

¹ Hague I B.B. pp. 150-1.

³ Bonfils, *op. cit.* sec. 1219.

⁵ Brussels B.B. p. 280.

² Bluntschli, *op. cit.* sec. 643 *bis*.

⁴ Hague I B.B. p. 150.

⁶ Hague I B.B. p. 151.

war, no doubt, the fine is heavier, but then it is inflicted, not by a benevolent municipality with an eye to the elections, but by a military occupant whose interests may be vitally endangered by the damage to his communications, by whomsoever caused. Given the solidarity which exists in the modern borough or organised community, the system of collective punishment for acts which it may generally be regarded as being in a position to prevent—though it may not have had the power to do so in the particular case which arises—is not an unreasonable one. I have compared the inhabitants of an occupied country to persons under recognisances. Pursuing the same idea here, one might say that the town or village community is in the position of a surety for the behaviour of the residents, and that each member is regarded by the occupant as a bondsman who is legally, if not morally, responsible for his fellow-citizens' default.

The war of 1870-1 witnessed the adoption of a wide and somewhat inconsequent system of collective pecuniary punishment. Heavy contributions were levied on towns which offered resistance—*c.g.*, Châteaudun—while those which received the Germans hospitably, like Chartres, or at least passively, like Dieppe, were not called upon to pay anything.¹ I have spoken already of the contribution of 25 francs *per caput* levied on the occupied provinces to bring them to a better mind regarding resistance; this levy was really a fine imposed on non-combatants because their nation and its armies chose to fight while any hope remained. For any damage done to the German communications enormous fines were the penalty; the same stypitic was applied when the majesty of Germany was wounded by anything in the nature of unorganised resistance. The parish of Launois had to pay 10,000 francs to the families of two dragoons "murdered" by the *Francs-tireurs*.² The town of Châtillon was fined a million francs because a bridge was destroyed; Fontenoy village was burnt down and the people of Lorraine fined ten million francs for the destruction of the bridge over the Moselle; Étampes paid 40,000 francs for a cut

Collective
fines in
1870-1.

¹ Hozier, *Franco-Prussian War*, Vol. II, pp. 212-14.

² *The Franco-German War, by Generals and other officers who took part in the Campaign* (translated by General Maurice), p. 553.

telegraph wire; Orleans was fined 600,000 francs because a German soldier was killed after the city had been occupied.¹ At Dijon, General Werder demanded a sum of 500,000 francs afterwards reduced to 300,000 francs, as security for the good behaviour of the town during the German occupation. The money was lodged and was restored to the Mayor on the evacuation of the town, the conduct of which had been exemplary.²

The destruction and seizure of property by an occupant.

I have already spoken of the war right respecting the destruction and seizure of property,³ and what I have said on the subject is applicable to the case of occupation, so far as the circumstances which make such destruction or seizure a military necessity may exist under occupation. The destruction of Atlanta, already referred to, is a case in point. Sherman could not hold the city as he required all his troops for the march to the East, and he could not leave it to be re-occupied by Hood; therefore, he destroyed it. An occupant may always destroy fortified works, arsenals, and the like; and, when tactical exigencies demand, any kind of property whatever. I am now concerned rather with the question of the legitimacy or illegitimacy of appropriating, using, or sequestering property, public or private, as affected *by the nature of the property*. What I shall say must all be read subject to the proviso that all and every kind of property (save that protected by the Geneva Convention) may be destroyed for reasons of imperative military necessity. And it may also be destroyed where the destruction is necessary for the health of the occupying troops. General Miles, for instance, was entirely justified in having the fever-infected houses burnt down at Santiago when he occupied that town in July, 1898.⁴

Public money.

Cash in the public treasury is always confiscable. "Public monies belonging to a hostile Government," the British *Field Service Regulations* lay down (Part II, p. 64), "will be appropriated as directed by the commander-in-chief." As Professor Holland points out, however, "some forms of property, nominally belonging to the State, *e.g.*, the funds of savings banks, may be

¹ Maurice, *op. cit.* p. 563; Bonfils, *op. cit.* sec. 1219.

² Hozier, *Franco-Prussian War*, Vol. II, pp. 174, 242.

³ *Vide supra*, pp. 111 ff.

⁴ Titherington, *op. cit.* p. 316.

in reality private property under State management.”¹ Again, in some Continental countries, as in Belgium, the State holds and administers, but does not own, funds destined for the pensions of widows and children of functionaries, such as in England are provided like other public expenditure in the annual estimates; and also “Government establishments for the reception of deposits required by law” (“*caisses des consignations*.”)² Monies of these kinds would appear to be private rather than public property. The funds of municipalities, as is pointed out in the *Kriegsbrauch im Landkriege* (p. 58, *note*), not being State property, are immune from confiscation.

There is a considerable difference of opinion as to the significance of the words *valeurs exigibles*, “realisable securities,” and *intreibarre Forderungen*. All writers admit the occupant’s right to appropriate and realise documents “payable to bearer”; the difficulty is as to “monies due upon bills or cheques requiring endorsement, or upon contract debts in any other form.”³ M. Bonfils dissects the question in this way:

1. The occupant has an unquestionable right to forbid all payments to the dispossessed Government.

2. He must not exact debts which have not become due.

3. His right as regards debts which are due or become due during the occupation is doubtful. He may take the interest of the debt, but the debt itself—the capital—would not seem to pass to him from the mere fact of occupation. “The debtor remains bound to his original creditor by an engagement which the events of war cannot touch.” On the other hand, the occupant may seize cash in the public treasury—and what is cash but, *inter alia*, paid debts?⁴

M. Bonfils, it will be seen, inclines to allow an occupant to exact debts. Professor Pillet takes the opposite view; he points out that if the occupant may call up debts due to the original sovereign, he must pay debts due *by* the latter—which he would never consent to do.⁵ Professor Westlake and Mr. Hall are both of opinion that the legitimate sovereign has alone the power to recover debts due to a country which is merely occupied, not conquered. Mr. Hall remarks that an incorporeal

¹ British Official *Laws and Customs of War*, p. 38.

² Brussels B B. p. 307.

³ Hall, *International Law*, p. 418.

⁴ Bonfils, *op. cit.* sec. 1191-2.

⁵ Pillet, *op. cit.* pp. 252-3.

right "arises out of the purely personal relations between the creditor and the debtor—it inheres in the creditor," and that therefore it is only when the occupant has succeeded to the full rights of the former sovereign, by right of definitive conquest, that the old ruler's identity can be regarded as transferred to the new so as to give him the right to sue for *choses in action*.¹ Professor Westlake holds that if the occupant has physical power over the occupied district, he has no legitimate power therein, for the old sovereign's juristic rights remain untouched and "the occupant who is not a conqueror does not represent the person of the enemy State."² This view is certainly the more satisfactory one, from the theoretical standpoint, but whether it will be adopted in practice is extremely open to doubt. The solution of the difficulty proposed by Baron Jomini at Brussels (from which Conference the term *valeurs exigibles* dates)—that the question whether debtors who have paid the occupant are legally discharged or not should be settled on the conclusion of peace³—is not a satisfactory solution. It is merely postponing the solution.

Property
directly
adaptable
to a war-
like end.

Warlike material, and all property which is directly adaptable to warlike purposes (railways and other means of communication, etc.), may be seized by the occupant, whether belonging to the State or to individuals; but there is this important difference between State-owned and privately-owned property of the kinds referred to—that the former may be regarded by the occupant as (to so speak) a *keepsake*, while the latter is only a *deposit*. The latter kind of property must be restored or compensation must be paid to the owners, and the seizure must be acknowledged by some form of receipt.⁴ The Brussels Conference had made provision for the restoration of railway material, telegraphs, and ships belonging to private persons, but had made no similar provision as to *dépôts* of arms and

¹ Hall, *International Law*, p. 419.

² Westlake, *International Law*, Part II, pp. 103-4.

³ Brussels B.B. p. 308; see also p. 244.

⁴ See the Report of the Hague Committee of 1899, which states that "the Committee is of opinion that the fact of seizure must evidently be established in some fashion, if only to afford the dispossessed owner some means of claiming the indemnity expressly provided in the text." (Hague I B.B. p. 151.)

munitions taken from individuals. The reason was that the latter were regarded as "contraband of war" which the occupant was entitled to appropriate in perpetuity. As I have said before, the conception of "contraband" is an impossible one to apply to land war, and the distinction which the Brussels Conference made was also open to the practical objection, from the invader's point of view, that it placed a premium upon the removal of all private stores of arms and munitions, which it would always be to his interest to prevent his enemy securing and usually a great advantage to him to secure for himself. The first Hague Conference abolished the distinction between war material and railways, etc.

As regards railway rolling stock belonging to the State, a question of some difficulty arises. Article LIII does not, of course, empower an occupant to appropriate this or other State property: it only forbids him to seize other property than that mentioned. It is the custom of war which gives him the right to confiscate, absolutely, the cash, warlike material, supplies and stores of his adversary. Does that custom authorise him to appropriate the occupied State's railway material, too, to carry it off and keep it after peace is made? The question is discussed. Some authors—like Rouard de Card, a great authority on the treatment of property in war—would regard the rolling stock as *matériel* of war and allow the occupant to appropriate it definitively. Others—like Stein—would consider as one and inseparable the rolling stock and the permanent way, neither being of any use without the other, any more than a foundation is of any use without a house, and would permit the occupant to use the material (or to destroy it if necessary) but not to keep it (if in existence) after the war.¹ The latter view is that adopted in the *Oxford Manual* (Article 51). The question was mentioned at the Hague in 1899, but not decided, "the Committee being of opinion that this question is one of those which may be settled by the Treaty of Peace."²

Railway material owned by companies or individuals must be restored. But during the continuance of hostilities, the lines are held by the occupant, who may exploit them privately:

¹ Bonfils, *op. cit.* sec. 1185; *Kriegsbrauch im Landkriege*, p. 66.

² Hague I B.B. p. 151.

to whom should surplus profits go? commercially. To whom do the profits—if any—the excess of revenue over expenditure, go in such a case? Evidently to the proprietors of the lines; it is a case not of public but of private funds. When the Germans seized the French railways in 1870, they undertook to keep a profit and loss account of the working of the lines, and, after the war, to hand over to the administration concerned whatever was found to be due in respect of accrued profits. The Peace Treaty provided for a mixed commission being charged with the adjustment of the indebtedness of the Imperial German authorities to the French concessionary companies to whom the lines belonged.¹

Postal and telegraphic services. What I have said as to railway services applies equally to postal and telegraphic services.

The treatment of abandoned houses and lands. To indicate the way in which the various kinds of public and private property are treated by an occupying army, I do not think I can do better than give the rules on this subject drawn up by the Japanese authorities when Dalny was occupied in 1904.² They are an admirably clear, sound, and practical statement of the correct war law and usage of the matter. The paragraph authorising the occupation of abandoned private immovable property reads strangely like an extract from Sherman's orders for the administration of Memphis, Tennessee, in 1862, wherein he instructed his quartermaster, in accordance with Grant's instructions, to take possession of all vacant stores, and houses in the city.³ In the Franco-German War, too, the houses of absentees were always taken first for billeting purposes.⁴ But the property of even absentees may not be alienated. One sees the *raison d'être* for this rule of war law in what happened in Bulgaria in 1877–8. The Russians gave the farms and goods of the fugitive Turks to their Bulgarian allies; the result was, as might have been expected, agrarian trouble of a virulent type when the original owners returned.⁵

Japanese rules for treatment of property at Dalny. I.—Public Property of the Enemy.

A. REAL.

(a) Buildings, lands and other immovable property belonging to the State will be made use of by our Army, or will be a source

¹ Bonfils, *op. cit.* sec. 1186; Pillet, *op. cit.* p. 272.

² Ariga, *op. cit.* pp. 354–5.

³ Sherman, *Memoirs*, Vol. I, p. 271.

⁴ Sutherland Edwards, *op. cit.* p. 52.

⁵ De Martens, *op. cit.* pp. 286–8.

of revenue for it. They can only be destroyed for urgent military reasons. Except in that case, they should be administered as usufruct, and should never be annexed. Nevertheless *dépôts* of arms, telegraphs and telephones will be seized.

(b) Immovable property belonging to the town of Dalny, and to establishments devoted to religion, charity, arts and science will be protected and treated as private property.

B. PERSONAL.

(a) Specie, bills of credit, arms, military stores, railway material, carriages, horses, ships, provisions, clothing and all articles of use in war will be seized.

(b) Property belonging to the town of Dalny and to establishments devoted to religion, charity, education, art and science, will be treated as private property.

II.—Private Property.

A. REAL.

(a) Only lands, buildings or immovable property, the owners of which have left without appointing administrators, may be temporarily occupied by our army.

(b) Ordinary immovable property may only be put to our use by way of requisition.

B. PERSONAL.

(a) Only railway material, ships, arms, military stores, horses, supplies, clothing and all articles that can directly be of use in war will be seized.

(b) Other personal private property will only be put to profit by our army as a tax, contribution or requisition.

III.—Property of unknown Ownership.

When it is not clear whether property is public or private, it will be temporarily regarded as public property upon condition that the principle of private property is applied to it if, subsequently, the private ownership is clearly proved.

REMARKS.

(1) As the administration of the Railway Company of Eastern China may be considered as a State undertaking, everything owned by it or connected with its working will be considered and treated as property of the State.

(2) As the greater part of the property of the town of Dalny is so situated that it is impossible to ascertain definitely the ownership, especially after the destructive acts of the Russians, the pillage and devastation of marauding bands and of the Chinese inhabitants themselves, no provision can be made with respect thereto. That to which the owners can prove their right by incon-

testable evidence, will be treated according to the principles of international law.

(3) Private property seized will be restored and the question of indemnity settled when peace is re-established. For every article of private property seized by the army, a certificate will, as soon as possible, be furnished.

(4) When our army makes use of property the ownership of which is not certain, the designation of these articles, their number, and any information as to the place where they were found, etc., etc., will as far as possible, be recorded.

The words
"at sea"
in the
*Règle-
ment*.

The words "at sea" in Article LIII, which may seem inapplicable to land war, would cover the case of ships seized in a port by land troops—as at Port Arthur in 1905—and more especially ships destined for river navigation. The Confederate General, Forrest, captured with his cavalry two river gunboats and a number of transports in 1864.¹

The rules
of
usufruct.

It is a question whether, as regards forestry, the "rules of usufruct" mentioned in Article LV are those already in force in the occupied territory or those ruling in the occupant's State. Bluntschli would give the new-comer the right to apply his own laws on the subject,² but seeing that the occupant is bound to maintain existing laws and regulations as far as possible, the local rules would appear more appropriate. The main object is, however, to prevent barbarous treatment (*Raubwirtschaft*) of the forests.³

The treat-
ment of
churches,
works of
art, etc.

With the subject of Article LVI, I have already dealt sufficiently. Roughly, one may give the gist of the Article as this: first, a commander may, if necessary, turn a church into a hospital, but he may not auction the vestments or other church property to raise money.⁴ Secondly, he must not carry off or damage that class of property which may be generically described as "starred by Baedeker."

The shore-
ends of
cables.

At the Hague Conference of 1899 it was proposed to add the words "câbles d'atterrissage"—"shore ends of cables"—to

¹ Grant, *Memoirs*, p. 544.

² Bluntschli, *op. cit.* sec. 646. See Bonfils, *op. cit.* sec. 1182.

³ Brussels B.B. p. 251.

⁴ But such a "forced sale" might be quite justified if the ecclesiastics responsible for the church property had refused to comply with a proper requisition or demand for a contribution, imposed in respect of the church property.

the list of property (railways, telegraphs, etc.), which a belligerent was entitled to seize, subject to his restoring them or paying compensation. The proposal was abandoned owing to Great Britain's refusal to accept any provision which seemed to trench upon maritime war law. No similar objection was raised in 1907 to the much wider provision on the same subject contained in Article LIV, which is an offspring of the last Hague Conference. The point dealt with in the Article is only one of several which arise in connection with the treatment of ocean cables in war. The Institute of International Law discussed the whole question in 1902 and agreed to the following rules:—

1. A submarine cable uniting two neutral territories is inviolable.

2. A cable uniting the territories of two belligerents or of two parts of the territory of one of the belligerents may be cut anywhere, except in the territorial waters or the neutralised waters of a neutral State.

3. A cable uniting a neutral territory to the territory of one of the belligerents may not under any circumstances be cut in the territorial or neutralised waters of a neutral State. In the high sea, this class of cable can be cut only if an effective blockade exists and within the limits of the line of the blockade, and the cable must be restored with the least possible delay; it may always be cut on the territory or in the territorial waters of an enemy's territory, up to a distance of three marine miles from low water mark.

4. The liberty a neutral State has of transmitting messages does not imply the right to use the cable, or allow it to be used, clearly to assist one of the belligerents.

5. In the application of these rules, no difference is to be made between cables belonging to the State and those belonging to individuals, or between cables belonging to the enemy and those belonging to neutrals.¹

The third of these rules, it will be noticed, would give a military occupant an absolute right to cut the shore end of a cable joining the occupied country to a neutral one; Article LIV makes him liable to pay compensation in such a case. The point was one of some doubt. Chili paid compensation for cutting the cable of a British Company in her war with Peru. But when Admiral Dewey cut the Hong-Kong—Manila

¹ Bonfils, *op. cit.* sec. 1278.

cable at Manila in 1898 the United States declined to admit the claim to compensation preferred by the British Company which owned the line.¹

Tabular statement showing treatment of property under occupation.

In the following table I have tried to give in a rough but concise form the war law provisions respecting the treatment of certain forms of property during occupation.

TABULAR STATEMENT SHOWING THE TREATMENT OF PROPERTY IN AN OCCUPIED COUNTRY.

Property may be either :

- (i). Confiscable, when it becomes the property of the occupant outright, no indemnity or compensation being due (C).
- (ii). Not confiscable, but subject to sequestration by the occupant, who must, however, return the property at the peace or pay compensation (S).
- (iii). Neither confiscable nor sequestrable, but subject to be requisitioned (for barracks or billets, *e.g.*, services or supplies) (R).
- (iv). Subject to usufruct, *i.e.*, it may be exploited by the occupant, who must not, however, alienate, damage, or destroy the substance (U).

CLASSIFICATION OF PROPERTY UNDER THE ABOVE HEADINGS.

Nature of the Property.	Public Property.	Private Property.	Remarks.
Movables :			
(1). Money, notes, realizable securities	C	R	¹ Whether state-owned railway rolling-stock is to be retained by captor or restored should be specially settled in the Treaty of Peace.
(2). War material— <i>depôts</i> of arms, uniforms, army stores, and, generally speaking, property directly adaptable to war	C	S	
(3). Railway material, telegraphs, shore-ends of cables, wagons, horses, motor cars, airships, boats, and other means of transit and communication... ..	C ¹	S	² Includes churches, temples, mosques, synagogues, etc., without any distinction as to the nature of the religious cult (Hague I.B.B. p. 152). As to <i>neutral</i> property in an occupied country, see Chapter XV.
(4). Movable property not directly adaptable to warlike purposes ...	R	R	
Immovables :			
(1). Institutions devoted to religion, ² charity, education, arts and sciences	R	R	
(2). Other buildings, lands, forests, and agricultural undertakings ...	U	R	
The property of communes— <i>e.g.</i> , "town halls, waterworks, gasworks, police stations" (Holland, <i>Laws and Customs of War</i> , p. 40)	R	R	
Shore ends of submarine cables connected with a neutral country ...	S	S	

N.B.—IMPERATIVE MILITARY NECESSITY MAY JUSTIFY THE DESTRUCTION OF ANY OF THE ABOVE KINDS OF PROPERTY.

¹ Westlake, *International Law*, Part II, p. 283.

CHAPTER XIII

THE GENEVA CONVENTION

Conventional Law of War:—Hague Règlement.

ARTICLE XXI.

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

Geneva Convention, 1906: Section I.—The wounded and sick.

ARTICLE I.

Officers and soldiers, and other persons officially attached to armies, shall be respected and taken care of when wounded or sick by the belligerent in whose power they may be without distinction of nationality.

Nevertheless, a belligerent who is compelled to abandon sick or wounded to the enemy shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to contribute to the care of them.

ARTICLE II.

Except as regards the treatment to be provided for them in virtue of the preceding Article, the wounded and sick of an army who fall into the hands of the enemy are prisoners of war, and the general provisions of international law concerning prisoners are applicable to them.

Belligerents are, however, free to arrange with one another such exceptions and mitigations with reference to sick and wounded prisoners as they may judge expedient; in particular they will be at liberty to agree:—

To restore to one another the wounded left on the field after a battle;

To repatriate the wounded and sick whom they do not wish to retain as prisoners after rendering them fit for removal or after recovery;

To hand over to a neutral State, with the latter's consent, the enemy's wounded and sick to be interned by the neutral State until the end of hostilities.

ARTICLE III.

After each engagement the Commander in possession of the field shall take measures to search for the wounded, and to insure protection against pillage and maltreatment, both for the wounded and for the dead.

He shall arrange that a careful examination of the bodies is made before the dead are buried or cremated.

ARTICLE IV.

As early as possible each belligerent shall send to the authorities of the country or army to which they belong the military identification marks or tokens found on the dead, and a nominal roll of the wounded or sick who have been collected by him.

The belligerents shall keep each other mutually informed of any internments and changes, as well as of admissions into hospital and deaths among the wounded and sick in their hands. They shall collect all the articles of personal use, valuables, letters, &c., which are found on the field of battle or left by the wounded or sick who have died in the medical establishments of units, in order that such objects may be transmitted to the persons interested by the authorities of their own country.

ARTICLE V.

The competent military authority may appeal to the charitable zeal of the inhabitants to collect and take care of, under his direction, the wounded or sick of armies, granting to those who respond to the appeal special protection and certain immunities.

The
Geneva
Conven-
tion.

To deal with the Geneva Convention at all adequately would require a separate, fairly bulky volume. I cannot deal with all the difficulties here. I shall confine myself to examining a few of the practical points which have arisen in applying the provisions of the Convention (for its provisions represent usage, stereotyped into a code in 1906) in modern wars, and to a concise synopsis of the work of the last Conference.

A Conven-
tion not a
*Règle-
ment*.

The Convention, is, as the name applies, an international diplomatic act by the precise terms of which the signatory Powers are bound. In this it differs from the Hague *Règlement*, which is an annex to a Convention. The *Règlement* may perhaps be compared to the Schedule to an Act of Parliament, while the Geneva Convention is an Act of Parliament itself; but the comparison must not in either case be pressed too far. Professor

Holland, who was a British delegate to the Geneva Conference of 1906, suggested that the text agreed upon should be drafted in the form of a Convention with a *Règlement* attached, on the Hague precedent. It would be convenient, he pointed out, to have the detailed instructional part separated from the diplomatic, so that, if some day a complete code of war law were drawn up, the former could be inserted therein as it stood. The other delegates raised objections to Professor Holland's suggestions. M. de Martens said that the experience with the Hague *Règlement* had not been fortunate, only four or five out of the twenty-eight signatory Powers having issued instructions to their troops in accordance with the terms of the agreement. The United States of America alone supported the British proposal, which was therefore lost.¹

The Convention of 1906 replaces that of 1864. The older Convention made no specific mention of the inviolability of the sick and wounded: the principle was thought too evident to require to be stated.² The new Convention is explicit on this point. Obviously, however, "wounded and sick" must be interpreted as "rendered helpless by wounds and sickness." If wounded men continue to fire while lying prostrate, as the Russians did, and as they were perfectly entitled to do, at Inkerman;³ or if they attack those who come to bring them succour, as the Dervishes did after Omdurman;⁴ or if they act as a wounded Boer did at Vlaktefontein (May, 1901) and crawl about the field of battle and shoot the enemy's wounded,⁵ they are not entitled to be "respected and taken care of." Such "wounded" as these I refer to, or such "sick men" as are often mustered to arms to defend a sore bestead and grievously punished garrison post, are enemy soldiers and nothing else. It is for wounded and sick who have ceased to resist that the Convention secures respect and care.

The Convention does not, as is commonly supposed, *neutralise* the sick and wounded. Its object is only to secure that they

Wounded and sick who have ceased to resist are protected.

Captured sick and wounded are prisoners of war.

¹ *Papers relating to the Geneva Convention, 1906* (C.d. 3933, 1908), pp. 46-7. (I shall refer to this "white paper" as "*Gen. Convn.*" in future.)

² Pillet, *op. cit.* p. 177.

³ Kinglake, *Crimea*, Vol. VI, p. 471.

⁴ Winston Churchill, *River War*, Vol. II, pp. 195-7.

⁵ *Times History*, Vol. V, p. 284.

are tended and not maltreated, and that for this purpose the sanitary *personnel* shall not be interfered with in their humanitarian work. The wounded and sick are protected from violence, but they do not cease, from the mere fact of being disabled, to be enemy combatants. They may be "casualties," but they are still soldiers, and if the enemy captures them they are nothing more nor less than prisoners of war. This point has been made quite clear in Article II of the new Convention, but that Article records no change in existing usage. After the battle of Shiloh, Sherman captured 280 Confederate wounded. "Not having the means of bringing them off," he says, "Col. Dickey, by my orders, took a surrender signed by the medical director (Lyle) and by all the attending surgeons, and a pledge to report themselves to you [General Grant] as prisoners of war."¹ The surgeons were not, of course, included in this obligation: "surgeons," he says elsewhere, "are not liable to be made prisoners of war."² The first Geneva Convention had no alterative effect upon the general status of the sick and wounded. Its sixth Article provided for the release of such wounded (or sick) prisoners as were incapable of bearing arms again, but for all others freedom could only be secured as the result of a voluntary agreement between the belligerents or by the prisoners giving their parole. An incident of the Chino-Japanese War, known as the *Too-Nang* Affair, is instructive in this connection. China was not a party to the Geneva Convention, though Japan was, but she, like Japan, rendered respect to the Red Cross in the war. In November, 1894, the vessel *Too-Nang* approached Port Arthur with some neutral persons (mostly Americans) belonging to the Tientsin Red Cross Society on board, and delivered to the Japanese authorities a despatch from Li-Hung-Chang stating that their object was to bring back the Chinese sick and wounded from Port Arthur. Count Oyama, commander-in-chief of the Japan expeditionary force, replied that the wounded were prisoners of war, and that he could not allow them to be taken away, even though the request was made through the good offices of the Consuls of neutral Powers. He went on to state that the Chinese wounded and sick were well cared for in the

The *Too-Nang*
affair.

¹ Sherman, *Memoirs*, Vol. I, p. 243.

² *Ibid.* p. 269.

Japanese hospitals, and ended by requesting the *Tōo-Nang* to leave the offing of Port Arthur by 6 p.m. on the same day. The incident was represented by some American newspapers as a "Japanese rejection of the Red Cross," but quite unfairly; the Japanese were strictly within their rights in what they did.¹ Another case bearing on the status of ^{The} wounded enemy soldiers arose in the Russo-Japanese War. ^{Chemulpo} ^{affair.} After the sea-fight at Chemulpo, at the commencement of the War (February, 1904), the crews of the two sunk Russian cruisers *Variag* and *Kōreyetz*, were received on board the foreign battleships in the harbour, and their position "was not well understood at first. The Japanese gave notice that the laws of war would require in such a case that the survivors should be prisoners of war, having been defeated in battle." Some of the neutral officers on the spot protested against this view of the case, but the matter was eventually settled by the captured Russians being released on giving a pledge not to serve against Japan during the war.² They were, in fact, treated as prisoners of war; their restoral on parole was purely a concession on the part of the Japanese. One finds the common misconception as to the position of wounded men cropping up also in the Anglo-Boer War. After the Spion-Kop disaster, the British medical officers and stretcher-bearers removed a considerable number of the British wounded from the mountain, though it was then held by the Boers. Botha appears to have allowed many of the casualties to be carried off, but the main work of removing them had been effected before he arrived on the scene.³ It was really a case of "bluffing" the commander who held the field, like the incident recorded by Sir Ian Hamilton as occurring after the battle of Penling in 1904, when the Russian ambulance parties removed not only the Russian wounded but also the rifles and ammunition of the dead and wounded.⁴ As I have said, the status of the sick and wounded who fall into the enemy's power is now clearly described by Article II of the Convention of 1906; and the

¹ Takahashi, *op. cit.* pp. 115-122.

² T. Cowen, *Russo-Japanese War*, pp. 124-5.

³ Pienaar, *With Steyn and De Wet*, p. 41. See *Times History*, Vol III, p. 296.

⁴ *A Staff Officer's Scrap Book*, Vol. I, pp. 357-8.

question is still further removed from doubt by the report of the proceedings of the Conference given in the British official "white paper." Convoys of evacuation, which were guaranteed on "absolute neutrality" by the earlier Convention, are now assimilated to "mobile medical units," and as to the patients therein, "it was agreed . . . that the sick and wounded could be made prisoners of war."¹

Special
arrange-
ments
may be
made for
restoral of
sick and
wounded.

The necessity for saying, as is said in Article II, that the belligerents are "free to arrange" certain releases which they require no special authority for arranging, is not at first apparent. "It was, however, thought desirable," says Professor Holland, "to suggest to commanders ways in which they may relax, in favour of the sick and wounded, the rigour of the rules otherwise applicable to prisoners generally." The new provisions are, at any rate, a great improvement on those of the earlier Convention. That Convention was drawn up by a body which consisted mostly of doctors, and the drafters hardly took sufficient account of the general rules of International Law. Consequently, although one may disagree with Bismarck's view that the Convention "was good for nothing and could not be carried out in practice,"² it is undeniably true that many of its provisions were found quite impracticable under the actual conditions of war. One of the Articles laid down that prisoners who, after being cured, were found incapable of serving, were to be restored to their own State. Obviously, such a provision was altogether too general, and one is not surprised to find the German *Field Service Regulations* (paragraph 475) stating that "officers whose return to their army might influence the results of the war may be kept back."³ One has only to think of Lord Raglan with "the historic appeal of his maimed sword-arm" (which he lost at Waterloo); of Masséna directing his corps at Wagram while he lay wounded in a carriage; of Hood and Ewell, the two Confederate generals who had only legs enough

Inca-
pacity to
serve.

¹ *Gen. Convn.* p. 37.

² Busch, *Bismarck*, Vol. I, p. 85. He said again that the convention was "nonsense,—but we must tolerate the thing." (*Ibid.* Vol. II, p. 41.)

³ See also the Japanese *Regulations for Prisoners of War*, which state that the rule as to restoring prisoners incapable of service is "not applicable to those who might have an important effect upon the war" (Ariga, *op. cit.*, p. 96).

between them for one ; of Torstenston, the Swedish general who, paralysed though he was, astounded all Europe by the rapidity of his marches : and one need not go to the domain of sea warfare for a greater name than any of these to prove that what amounts to incapacity to serve is and must be an unknown quantity. The new Convention imposes no obligation upon a commander to place captured sick and wounded in a category in any way distinct from that of other prisoners. It only throws out the suggestion that he may waive his strict war rights respecting them and restore them at once or subsequently. It may suit a commander's interests to hand over the enemy's wounded, whom he cannot, of course, treat inhumanely if he retains them ; it may be no gain to the other to receive them. The arrangement is purely facultative. After the Alma, the British found themselves unable to provide for the care and maintenance of the 500 Russian wounded who were left in their hands. When the Allies started on their flank march to Balaclava, these Russians were left in charge of one surgeon, Dr. Thompson, and his soldier servant, and as might have been expected, their sufferings were terrible. After a few days, they were removed to shipboard and handed over to their own Government at Odessa. In a letter to the Governor of Odessa, Admiral Dundas expressed the hope that the Governor would, "in the same feeling of humanity, receive and consider them as non-combatants until regularly exchanged." The Governor's answer was "cold and stern," says Kinglake, for he was angered at the restoration being ascribed to motives of humanity ; the poor, untended men were simply an incumbrance which it was convenient for the British to get rid of.¹

Russian wounded restored after the Alma.

A belligerent who has to abandon his wounded is not, it will be noticed, under any absolute obligation to leave with them the medical assistance which they need. Military necessity may justify him in omitting to do so and then the enemy commander is bound to succour the sick and wounded who have

A belligerent abandoning his sick and wounded is morally bound to leave some of his medical personnel with them.

¹ Kinglake, *Crimia*, Vol. III, pp. 332-6. "The St. Peterburg journals, not knowing that the British soldiers were no better off, denounced in angry and indignant terms the mock humanity of landing men whose wounds were bandaged with hay and straw, so that gangrene supervened in almost all cases, scarcely any having received any medical or surgical treatment that deserved the name." (Nolan, *War with Russia*, Vol. I, p. 436).

fallen into his hands; but the latter cannot effect the impossible. The retreating army is to blame if it has abandoned such large numbers of wounded and sick that all the efforts of the other belligerent cannot provide adequately for their care and treatment. In the earlier battles in Manchuria in the Russo-Japanese War, the Russians left so many wounded men lying on the battle-fields that the commander of the Japanese army at Si-Mou-Cheng, Major-General Ouyehara, addressed a complaint on the subject to the Russian commander, pointing out that the Japanese sanitary formations could not cope with the additional work thus thrown upon them and requesting that more care should be taken by the Russians to remove their sick and wounded.¹ After the battle of the Shaho the Japanese medical *personnel* found it absolutely impossible to attend to the Russian wounded as speedily as could have been desired. The foreign *attachés* with Kuroki's army were inclined to criticise and to attribute the delay to a disregard for the Geneva Convention, but obviously no Convention, however solemnly sealed and signed, can alter a natural law and enable a doctor to be in two places at once. If a retreating commander wishes to be sure that his wounded are properly attended to, he must, if their number is considerable, leave surgeons of his own with them. To do what the Greeks did at Larissa in 1897, when they left large numbers of sick and wounded in the hospitals without a single doctor to attend to them, with the result that many died before the Turkish medical officers arrived, is to fail in the spirit, if not in the letter, of the Convention.²

The protection of the wounded and the dead left on a battle-field.

Article III of the Convention imposes an onerous duty on commanders, which, however, has always been carried out in recent wars, says the official report of the Conference.³ It is in the night that follows a great battle that most of the tragedy and horror of war has always taken bodily shape. One remembers that the Geneva Convention itself had its origin—its first rough sketch—in the impression which the field of Solferino—that dreadful battle fought in the rain—wrought on the brain tissues of Henri Dunant. And Solferino was hardly

¹ Ariga, *op. cit.* pp. 132-3.

² Clive Bigham, *With the Turkish Army in Thessaly*, p. 57.

³ *Gen. Convn.* p. 27.

worse than some other great fights. There is no need to go back to the Bérésina or Eylau for evidence; every modern war, from the Secession to the Russo-Japanese—and especially those very two I name—has seen wounded men left untended after battle, in agony from wounds, pain and thirst, perishing of exhaustion, of starvation, of the violence of marauders, of the chill of frost or the heat of accidentally-kindled fires. No international agreement will ever make such things as these utterly impossible. Henry Villard, the war correspondent of the Secession times, visited the field of Perryville nine days after the fight (8th October, 1862). He found the dead still unburied and hogs making a gruesome feast off the corpses.¹ At Fort Donelson (February, 1862) many of the wounded on both sides were frozen to death after the battle.² After the “bloody bush-fight” of Chickamauga, where G. H. Thomas earned his name,³ some of the wounded were burnt to death through the shells setting the woods on fire; and the same thing happened at Chancellorsville.⁴ Worst of all in this way was the battle of the Wilderness; there the woods caught fire in many places and a large number of helpless wounded perished miserably in the flames.⁵ There is something sad as well as something humorous in the description of the Federals marching away from the Wilderness to Spotsylvania Court House (for another grim struggle) with their drum-corps playing the negro camp meeting tune, “Oh! ain’t I glad to get out of the wilderness!” But for all the sufferings of the wounded in the Secession War, there was none of that intentional barbarism which one finds in the Crimean War and the Russo-Turkish War of 1877-8. It is needless to go into details. Such as are interested in the subject will find ample material for study in the histories of these wars.⁶ One thing only I shall specially

The evidence of the Secession War.

Barbarism in the wars of 1854-5 and 1877-8.

¹ Villard, *Reminiscences*, Vol. I, p. 331.

² Draper, *op. cit.* Vol. II, p. 269.

³ Thomas was called the “Rock of Chickamauga” for his stubborn stand at that battle.

⁴ Gordon, *Reminiscences*, p. 209; Draper, *op. cit.* Vol. III, p. 116.

⁵ Grant, *Memoirs*, p. 457; Wood and Edmunds, *op. cit.* p. 321; Porter, *Campaigning with Grant*, pp. 73, 83.

⁶ For the Crimea—Russell, *Crimea*, pp. 236, 260; Kinglake, *Crimea*, Vol. V, pp. 256-7; Vol. VI, pp. 277, 469; Nolan, *War with Russia*, Vol. I, pp. 438, 548, 576, 600, 605. For the Russo-Turkish War—Nemirovitch-Dent.

draw attention to—namely, that cruelty to the enemy's wounded never "pays." It is rank bad policy. Many witnesses record that the Russian troops attacked in the later assault on the Shipka Pass with a fierce determination, a ruthless, almost fanatical heroism, which no defence could withstand. They had in their minds the thought of their murdered comrades, tortured and tattooed with the red cross, and of the pile of severed skulls which the Turks erected on the Pass after the first assault. Here, as at Plevna, the battle cry, "Remember your tortured comrades," roused the Russians to an irresistible ardour which must have seemed to the Turks a heavy price to pay for the satisfaction of sawing off a few wounded prisoners' hands and feet.

Some-
times it is
impossible
to take
up the
casualties
after a
battle.

Instances
in the
Anglo-
Boer,

There are occasions in war in which military necessity—the "lord paramount" of war—puts its veto upon any endeavour to collect the wounded and dead after a fight—whether because tactical considerations require that the ground on which they lie must be swept with shot and shell, to prevent the enemy seizing it (as happened at 203 Metre Hill, Port Arthur)¹ or because the holders of a jealously-guarded position cannot allow the enemy's search-parties to approach their line and spy out the secrets of the defence works. The wounded who fell in the attacks on the Tugela Heights (22nd and 23rd February, 1900) lay for forty-eight hours between the opposing lines, "suffering unspeakable agonies from their wounds, from heat and thirst, and from the stench of the dead with whom they lay intermingled. Attempts made by either side to succour them had invariably drawn a heavy fire."² Until the armistice of 25th February, they were exposed "alike to the elements and to the shot and shell of the combatants."³ One cannot blame Boers or British for want of humanity; large issues were at stake—issues thought to be more important than the lives of a few score of wounded men. Time and again the same impossibility of carry-

chenko, *Skobeloff*, p. 131; Herbert, *Plevna*, pp. 224, 268; Greene, *Russian Army and its Campaigns in Turkey in 1877*, p. 174; Epauchin, *Gourko's Advance Guard*, pp. 123-5; and De Martens, *La Paix et La Guerre*, *passim*.

¹ Ashmead-Bartlett, *Port Arthur*, p. 330.

² *Times History*, Vol. III, p. 532.

³ Maurice, *Official History*, Vol. II, p. 492.

ing out the provisions of the Geneva Convention was evidenced in the Russo-Japanese War. At Port Arthur the Japanese soldiers who fell in the assaults had necessarily to be left where they lay; attempts to remove them at night were frustrated by the flash-lights and star-shells of the fortress. Mr. Ashmead-Bartlett relates how he saw, from the advanced trenches towards Bodai, the bodies of those who fell a month before—"now little more than bone and uniform, for the sun did its work quickly in the hot climate."¹ The great heat of August and September caused the dead bodies to putrefy rapidly, and the surgeons had to serve out rags soaked in ammonia to the sentries in the advanced posts; in some places the sentries had to be relieved every half-hour. "Many of the wounded lay for days, almost within reach of their friends, until death put an end to their sufferings."² Wounded men crawled for shelter into every little dip and donga in the ground, and there they lay "to die a lingering death from thirst or starvation, far removed from the assistance of their comrades."³ All that could be done was to remove the dead—for no wounded were then left alive—in the next assault, usually a month or more later.⁴ One shudders to think that such things could happen in a civilised war between two Powers bound by the Geneva Convention. It is hardly going too far to say, as one writer does, that "the Red Cross was never respected."⁵ The fact is that the sheer necessity of the defence warranted the Russians in, practically, disregarding it; before that necessity every other consideration had to give way. As Professor Ariga says, no one but a writer without experience of the actualities of war can say that "the enemy exceeded his rights in opening fire on those who, wearing the emblem of the Red Cross, came out to remove the dead and wounded."⁶ It was impossible to allow the nature of the ground and the secrecy of the defensive positions to be examined even by men who acted no doubt from single-hearted humanitarian motives, but who still had eyes to see with. The scene of the unsuccessful assaults had, for imperative tactical reasons, to be closed against the assailant's search-parties. Port Arthur, with

and
Russo-
Japanese
Wars.

¹ Ashmead-Bartlett, *op. cit.* p. 176.

² *Ibid.* pp. 104-5.

³ *Ibid.* p. 431.

⁴ Ariga, *op. cit.* p. 161.

⁵ Ashmead-Bartlett, *op. cit.* p. 189.

⁶ Ariga, *loc. cit.*

its sad story of wounded men left to die like rats in a hole, is a standing reminder of the truth that, at best, convention is idealism, war realism.

Rarely possible to bury the dead at once after a battle.

"The cases," says Professor Ariga, "in which it is possible to bury the dead immediately after a battle are much less numerous than those in which it is absolutely impossible to do it for several days after the fighting."¹ After the battle of the Shaho the corpses lay where they had fallen for 150 days. To have granted an armistice would have been doubly harmful to the Japanese, as delaying their own work of strengthening their line and giving the enemy an opportunity of examining the defence works, consisting of wire entanglements, mines, etc., which it was imperative to keep secret. There was no fear here, as at Port Arthur, of the decaying bodies causing contagion, for they were frozen at once by the extreme cold of the Manchurian October.² Usually the fear of infection is a sufficient motive with commanders for clearing up a battlefield. Chloride of lime is one of the most important accessories of warfare—more important even than salt—hardly less important than ball-cartridge. The experience of modern war is that enteric and dysentery kill off more men than the enemy's bullets and shells. But it was not so in the Japanese army in 1904-5. The freedom of that army from disease was partly due to the splendid efficiency of the Japanese medical service, to which Sir Frederick Treves has rendered generous testimony;³ but it was still more the result of the thorough system of cleaning up the battle-grounds which prevailed in the Japanese armies. The regulations issued on this subject will be found at length in Professor Ariga's work.⁴

The examination and collection of the dead.

The provisions as to examining the dead, collecting identity marks, etc., are innovations; their object is to prevent the possibility of men being buried alive and also to secure proper returns of the fallen. The duties referred to have been generally recognised as binding in theory but actually have rarely been carried out with any thoroughness. Sherman says that the names of the "unknown" in the cemeteries where are buried the dead of the great war, account for about half of

¹ Ariga, *op. cit.* p. 163.

² *Ibid.* p. 167.

³ In *The Other Side of the Lantern.*

⁴ Ariga, *op. cit.* pp. 154-8.

all the fallen.¹ One does not wonder at this when one reads that after the fight at the "Bloody Angle" at Cold Harbor, where the dead lay three or four feet thick, the "Union soldiers buried the dead by simply turning the captured breastworks upon them."²

It is for the commander who remains in possession of the field to collect and protect the dead and wounded. After Inkerman the Allies proposed to Prince Mentschikoff, under a flag of truce, that he should send out and bury his dead; "he answered rightly enough," says Kinglake, "that by the custom of nations the task of burying the dead lies on those who hold possession of the field."³ The bodies must be carefully examined before they are buried or cremated. Presumably the mode of burial would so far as possible be that in fashion in the deceased's country. The Japanese buried the Russian dead in 1904-5, although cremation is the rule in Japan: only in cases in which contagion was feared was cremation provided for in the regulations for cleaning up the battle-fields.⁴ When the dead were cremated, the ashes were to be preserved, or if this were not practicable, locks of the dead men's hair were to be cut off before incineration and kept.⁵ Very few of the Russian dead appear to have been cremated. Even after the fall of Port Arthur, when the bodies lay putrefied, hacked to pieces by mines and shells, utterly indistinguishable from each other, on the hills round the city, the Japanese authorities allowed the Russian sanitary commission to collect and bury the corpses of the fallen defenders. Professor Ariga had given his opinion that to cremate the bodies would be unobjectionable, but in this as in other cases "the Japanese officers were more zealous than a specialist in International Law for conformity with the principles of civilised war."⁶ The general Russian aversion to cremating the dead was properly and generously taken into account by the victorious Japanese, who would have been quite justified in insisting upon incineration for reasons of

The commander who holds the field must protect the dead and wounded.

The mode of burial.

Japanese practice.

¹ Sherman, *Memoirs*, Vol. II, p. 394.

² *Century Magazine* ("Battles and Leaders"), Vol. XXXIV, p. 307.

³ Kinglake, *Crimea*, Vol. VI, pp. 467-8.

⁴ Ariga, *op. cit.* pp. 156, 170.

⁵ *Ibid.* p. 154.

⁶ *Ibid.* p. 171.

hygiene, as they did in the Chinese War of 1894-5.¹ The dead had sometimes to be cremated, for climatic reasons, in the Cuban campaign of 1898.²

Transmis-
sion to the
enemy of
informa-
tion rela-
tive to his
dead,
wounded,
and sick.

Article IV partly reproduces and partly supplements Articles XIV and XIX of the Hague *Règlement*. In addition to the information which a belligerent is bound to furnish thereunder, the Japanese rendered to the Russian Government, through the French Minister at Tokio, a list of the places of burial, the rank, the regiment, and, where possible, the names, of the Russians who fell in battle and were buried by the Japanese. As Professor Ariga observes, the Convention, strictly read, imposes no such duty on a belligerent. All he is bound to do is to collect such marks of identity and valuables as he can find on the dead fallen in battle; "he is not bound," says Professor Ariga, "to proceed to identify all the enemy's dead collected and buried on the field by the different corps of his army."³ Perhaps the provision of Article III for a "careful examination" of the bodies is intended to cover a nominal roll of their numbers, regiments, etc., being prepared as well. If so, it would have been well to have stated the obligation expressly.

Identity
marks.

The use of marks of identification, showing the soldier's name, religious faith, company and regiment, is general. It was proposed at the last Conference to make the use universally obligatory, but the proposal was rejected on the ground that "such marks might, when found by the enemy, furnish him with valuable information as to the disposition of the hostile army."⁴ But soldiers themselves are little disposed to think of tactical considerations like this; they wish to be remembered in death, to leave some indication of themselves for their families. One finds the Federal soldiers of the Secession War and the Boers of 1899-1902 improvising "identity discs" in the form of slips of paper pinned to their clothes, or of names traced inside their hats, before an engagement.⁵ The first army to adopt "identity discs" officially appears to have been

¹ Ariga, *op. cit.* pp. 171-2.

² *R.D.I.* September-October, 1898, p. 786.

³ Ariga, *op. cit.* pp. 172-177.

⁴ Holland, *Laws of War on Land* (1908), p. 28.

⁵ Porter, *Campaigning with Grant*, p. 174; Hillegas, *With the Boer Forces*, p. 116.

the Prussian army. In the war of 1870-1, each German soldier carried a paste-board badge showing his regiment and number. The badge was commonly known as the man's "tombstone" (*grabstein*).¹

At the last Geneva Conference the Dutch delegation proposed to forbid categorically the use of wounded men as cover, but the proposal was lost by a large majority;² presumably because such a provision was felt to be out of place in the Convention, not because it was an unnecessary or improper one. The practice of sheltering behind a wounded enemy and firing from the security thus obtained is a clear act of inhumanity which is punishable under the usage, if not the conventional law, of war. Another objectionable ruse which has been adopted in more than one modern war was not discussed by the Conference at all. The ruse I refer to was practised by the Russians in the Crimea and is thus described by an historian:

The use of wounded men as cover.

The ruse of simulating wounds for a hostile purpose.

A number of Russians lay down, in attitudes cleverly imitative of men who had fallen from the fire of small arms, and as soon as the Greys passed, rose and fired upon them.³

The incident Nolan refers to occurred at the fighting which took place during the Allies' flank march from the Alma to Balaclava. At Inkerman, the ruse was repeated, the "resurrection boys" (as the British soldiers called them) dropping down in the brushwood and pretending to be dead until the charge had swept past.⁴ In the fighting at Port Arthur in 1904, the Japanese soldiers resorted to the desperate expedient of falling beneath the wire entanglements shamming death, in order to cut the strands when the Russians were off their guard. The result was an indiscriminate shooting of all wounded men who lay close to the wires. "I have frequently seen the Russians," says Mr. Ashmead-Bartlett, "notably on October 30th, start up in their trenches and deliberately shoot any man who stirred." It was cruel, he says, but legitimate; the Russians could not risk having their defences pierced by

¹ Hozier, *Franco-Prussian War*, Vol. I, p. 237.

² *Gen. Convn.* p. 36.

³ Nolan, *War with Russia*, Vol. I, p. 463.

⁴ Kinglake, *Crimea*, Vol. VI, p. 317.

Unjusti-
fiable
Russian
Brigade
order of
1905.

men feigning death.¹ But no such justification can be found for an order which was issued to the 1st Brigade of the 31st Russian Infantry Division in Manchuria in February, 1905. The order was as follows:—

Instruct all the troops that if, in their advance, they meet Japanese stretched on the ground, and more particularly lying on their backs, they are to run them through the body, because the Japanese pretend to be wounded with the intention of firing on us from the rear when the attack commences.²

The document containing this order fell into the hands of the 1st Japanese Army at Mukden, and the legal councillor of that army, M. Kafoukou, was asked to report upon it from the point of view of International Law. The substance of his report was as follows:—

The order was an inhuman one, for it enjoined the killing of wounded men. Such a measure could properly be adopted only (1) as a punishment, or (2) as an act of reprisals. If adopted as a punishment, then it should have been under the sentence of martial law or military justice. If adopted as a measure of reprisals, satisfaction should first have been demanded of the Japanese authorities, but this was not done; no steps were taken with a view to having the objectionable ruse forbidden.

As to whether the ruse was actually legitimate or not, M. Kafoukou held that it was one which belligerents ought to proscribe, because it made the application of the Geneva Convention difficult and rendered the position of wounded men left lying on the field a precarious one.³

Professor Ariga himself observes that “for an officer having authority over thousands of men to give an order, written in cold blood, to bayonet every soldier lying on the field, systematically,” is “a flagrant violation of law for which the whole Russian army must bear the responsibility.”⁴ With this view one may agree while admitting that the ruse out of which the illegal Russian order arose was itself illegitimate. No treacherous simulation of sickness or wounds, says Dr. Oppenheim, is permitted among the ruses of war.⁵

Article V replaces an Article of the old Convention which

¹ *Port Arthur*, p. 187.

² Ariga, *op. cit.* p. 150.

³ *Ibid.* pp. 150-1.

⁴ *Ibid.* p. 151.

⁵ *International Law*, Vol. II, p. 118.

provided that inhabitants bringing help to the wounded should be respected and remain free, and that any house which sheltered a wounded man should be exempt from furnishing billets. This provision was objectionable; the first part made robbery and espionage possible, since nothing was said as to the permission of the military authorities being required; and the second was an incentive to householders who wished to escape the unpleasant duty of finding quarters to carry off a wounded man as a protection. The new Article leaves it to the discretion of the commander on the field to call upon the inhabitants for assistance, which he may do by way of requisition but which would probably be better done by an appeal to their charity, especially seeing that the wounded and sick may be their own kinsfolk and acquaintance. Whether he "requisitions" or "appeals," the assistance rendered by the inhabitants will be rendered under his supervision. In the Russo-Japanese War, it was found that the Chinese were afraid that succouring wounded Russians would be regarded as a hostile act by the Japanese. M. Minakawa, legal councillor of the 4th Army, records a case in which a wounded Russian, forgotten after a skirmish, paid a Chinaman all the money he had with him upon the latter's promising to carry him to either a Japanese or a Russian hospital. The Chinaman carried him a certain distance and then abandoned him, fearing to be punished for having helped a Russian. To prevent a recurrence, the Japanese authorities issued a proclamation in all the Chinese villages, in which they promised a recompense to inhabitants who succoured wounded men, whether Japanese or Russian. The proclamation had little effect; so far from rendering aid to the wounded the Chinese usually robbed them of all their possessions. In this, says Professor Ariga, there was nothing astonishing to one who knows the Chinese character; in the war of 1894-5, the inhabitants were known to refuse a glass of water to their grievously wounded, thirst-parched compatriots, simply because they were natives of another province.¹ Surely parochialism could no further go. Still, it requires a considerable educative process, one must admit, to make men see the logic of doing all one can, in envy, hatred, and malice, to drill

A commander may call upon the inhabitants to assist the wounded and sick.

¹ Ariga, *op. cit.* pp. 135-8.

holes in one's enemy, and then, the object achieved, to try just as hard to heal them. One can appreciate the Chinese attitude, at least in the war of 1904-5; it must have seemed unquestionable to the primitive mind that helping a Russian was injuring Japan.

Section II.—Medical Units and Establishments.

ARTICLE VI.

Mobile medical units (that is to say, those which are intended to accompany armies into the field) and the fixed establishments of the medical service shall be respected and protected by the belligerents.

ARTICLE VII.

The protection to which medical units and establishments are entitled ceases if they are made use of to commit acts harmful to the enemy.

ARTICLE VIII.

The following facts are not considered to be of a nature to deprive a medical unit or establishment of the protection guaranteed by Article VI :—

1. That the personnel of the unit or of the establishment is armed, and that it uses its arms for its own defence or for that of the sick and wounded under its charge.

2. That in default of armed orderlies the unit or establishment is guarded by a picket or by sentinels, furnished with an authority in due form.

3. That weapons and cartridges taken from the wounded and not yet handed over to the proper department are found in the unit or establishment.

“ Mobile units ” and “ fixed establishments.”

The Convention discriminates between “ mobile medical units ” and “ fixed establishments,” as will be seen. The precise dividing line between the two is a little obscure, for though Article VI defines the former as units intended to accompany armies into the field (*en campagne*), the fixed establishments referred to in the Article do also, in a sense, go into the field, and though called “ fixed,” they are (as Professor Holland says¹), hospitals which, *whether actually movable or not*, are situated on a line of communications or at a base. A suggestion that the words “ on the field of battle ” should be used instead of “ into

¹ *Laws of War* (1908), p. 30.

the field" was negatived at the Conference, as being too narrow. The point to be considered, therefore, is whether the hospitals (or ambulances) do actually accompany the troops, whether they move with them as part and parcel of the moving fighting body, or whether they remain on the line which feeds that body and which, though it may be constantly stretching out and moving forward, is rather a tentacle from than an organic part of the all-important body in front. I shall illustrate the distinction between the two kinds of medical units by taking the case of the British army medical formations. The following table gives a rough idea of the relative position of the various kinds of hospitals mobilised by an expeditionary force:—

Distinction exemplified by the case of British medical units.

A.

Troops in the field—cavalry, artillery, infantry, army troops. With these are *Cavalry Field Ambulances* (22 vehicles) and *Field Ambulances* (16 vehicles). These are "mobile medical units."

B.

Advanced line of communications beyond rail-head post—a kind of tentacle connecting the line of communications proper with the fighting troops (or troops "in the field"). At the top of this advanced line is a *Clearing Hospital* (accommodation for 200 sick), with a *Stationary Hospital* (200 beds) or two below it.

C.

Line of communications proper; along this line are *Stationary Hospitals* and *General Hospitals* (520 beds) at varying intervals, the main *depôt* being at the base.

These are "fixed establishments."

As to the medical formations at "A" and at "C" above no question can arise—the first are mobile, the second are fixed. Field ambulances have their own transport; the others have not. Again, stationary and general hospitals are equipped with beds and staffed by lady nurses; ambulances have neither. It is as to the Clearing Hospitals at "C" that some doubt may be

The classification of Clearing Hospitals. felt. Their function is, as the name implies, to pass on the wounded from the ambulances to the stationary and general hospitals. They are akin to the ambulances in not being equipped with beds and in having male nurses. They are akin to the hospitals in having no transport of their own and in being normally located at a fixed point—the advanced base. Transport is provided for them by the Inspector-General of Communications—usually in the shape of empty supply wagons or hired or requisitioned vehicles—and this they send forward to the ambulances and back to the stationary hospitals behind, thus acting as a “post-office,” so to speak, for the receipt and delivery of casualties. Their place, as I say, is fixed, but sometimes—*e.g.*, when the army in front is pursuing a flying enemy—some of their *personnel* and material may be sent forward to the field ambulances to take over the wounded from the latter on the spot.¹ At least one authority² regards the clearing hospitals as mobile units and there is a good deal to be said for this view. But it must be borne in mind that their character

¹ See *British Field Service Regulations*, Part II (*Organisation and Administration*, 1909), pp. 104–5, as to the duties of Clearing Hospitals in war.

² Colonel Macpherson, C.M.G., R.A.M.C., British medical delegate at Geneva, 1906, who most kindly wrote down his views for my information, through the good offices of my friend, Mr. A. D. L. Cary of the War Office, who has helped me unofficially in very many ways. Colonel Macpherson holds that the delegates meant by “fixed establishments” only hospitals opened permanently in some locality and in a solidly constructed building; and that even stationary and general hospitals may be mobile units when they are tented hospitals, capable of being placed anywhere. The view of Professor Holland, another of the British representatives at Geneva, is quite discrepant from Colonel Macpherson’s. He says (*Laws of War on Land*, 1908, p. 30):

“‘Fixed establishments,’ which might perhaps have been better described as ‘fixed units,’ would cover ‘stationary’ or ‘general’ hospitals (whether actually movable or not), placed on a line of communications, or at a base.”

The “mobile medical units” of the Convention of 1906 are the same formations as were called “ambulances” in the Convention of 1864, and the “fixed establishments” correspond to the “military hospitals” of the superseded Convention. The intention of the framers of the old Convention was to maintain the general war right of a belligerent to appropriate the “prize of war” which fell into his hands, except in so far as that right was inconsistent with the humane principle of providing immediate succour for the wounded. They therefore neutralised the material of the units which rendered first aid, so to speak, but left that of the hospitals outside the actual fighting area subject to the laws of war. See Moynier, *L'Étude sur la Convention de Genève*.

(as mobile or fixed) will be judged by a belligerent on the letter of the Convention, in the absence of any special agreement as to their classification; and that only such formations as *accompany* an army into the field come under the head of "mobile units." Clearing hospitals do not accompany an army into the field; their place is on the line of communications, both in point of actual fact and for the purpose of administration. It is on the extreme body-end, it is true, of the extensile antenna which stretches out from the constantly agitated, never-resting organism ahead, the field army, but still they *are* part of that tentacle and not of the body proper. They are not self-transporting, again, like the ambulances, and cannot go where the army goes; and as the principle of the distinction between fixed and mobile units is this, I take it, that the latter share the movements and fate of the army, while the former, being of their nature immovable, are left with the ground they stand on to the enemy, a unit which has not its special transport always at its disposal would appear to be properly classified as fixed. One cannot argue that Clearing Hospitals are mobile because they are essential to the usefulness of the ambulances; for they themselves depend on the stationary and general hospitals as much as the mobile units depend on them. I submit, therefore, with a good deal of diffidence, that they are "fixed establishments" under the terms of Article VI.

Under Article VIII (1) a medical unit has the right to defend itself, if attacked, without forfeiting its claim to respect and protection. Two interesting cases bearing on this provision arose in the Russo-Japanese War; both occurred at the battle of Mukden. In the first case, the "sanitary corps" of the reserve Japanese Guard Brigade was attacked near Sin-Toun by a force of retreating Russians; the "corps" repelled the attack, charged the Russians, and made them prisoners. Were they entitled to take prisoners? Unquestionably. If a medical unit may defend itself, it must have the right to kill its assailants: and if it may kill, *a fortiori* it may take them prisoners.¹ The second case was when the *personnel* of a hospital of the 6th Japanese division, 4th Army, joined in the defence of Mao-Tsia-Toun, near Mukden, which was attacked by a body of

A medical formation has the right to defend itself.

Cases in the Russo-Japanese War.

¹ Ariga, *op. cit.* pp. 207-9.

Russians whose retreat to the north was blocked by the town. While the fighting proceeded, Japanese reinforcements arrived and captured the Russians. In this case, the hospital had not been attacked; indeed, the object of the Russians was to escape, and they would not have wasted time in attacking a hospital. Professor Ariga holds, rightly, that in this case the conduct of the *personnel* was irregular.¹

Article
VIII (2)
does not
mean
what it
says.

Article VIII (2) is not well worded. As it stands, it implies that a medical unit will be disentitled to protection if the picket or sentinels detailed to guard it cannot produce a due authority (*mandat*), whereas the intention of the delegates was to make the possession or lack of the *mandat* determine whether the guard should be released or held as prisoners of war, in accordance with the provisions of Article IX.²

Section III.—Personnel.

ARTICLE IX.

The personnel engaged exclusively in the collection, transport, and treatment of the wounded and the sick, as well as in the administration of medical units and establishments, and the Chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

These provisions apply to the guard of medical units and establishments under the circumstances indicated in Article VIII (2).

ARTICLE X.

The personnel of Voluntary Aid Societies, duly recognised and authorised by their Government, who may be employed in the medical units and establishments of armies, is placed on the same footing as the personnel referred to in the preceding Article, provided always that the first-mentioned personnel shall be subject to military law and regulations.

Each State shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in every case before actually employing them, the names of the Societies which it has authorised, under its responsibility, to render assistance to the regular medical service of its armies.

¹ Ariga, *op. cit.* p. 210.

² *Gen. Convn.* p. 33.

ARTICLE XI.

A recognised Society of a neutral country can only afford the assistance of its medical personnel and units to a belligerent with the previous consent of its own Government and the authorisation of the belligerent concerned.

A belligerent who accepts such assistance is bound to notify the fact to the adversary before making any use of it.

ARTICLE XII.

The persons designated in Articles IX, X, and XI, after they have fallen into the hands of the enemy, shall continue to carry on their duties under his direction.

When their assistance is no longer indispensable they shall be sent back to their army or to their country at such time and by such route as may be compatible with military exigencies.

They shall then take with them such effects, instruments, arms, and horses as are their private property.

ARTICLE XIII.

The enemy shall secure to the persons mentioned in Article IX, while in his hands, the same allowances and the same pay as are granted to the persons holding the same rank in his own army.

Article IX protects the *personnel* engaged *exclusively* in sanitary duties. "Soldiers detailed temporarily to assist as sick orderlies cannot, therefore, claim any immunity."¹ The French *brancardiers* and the Russian *infirmiers*, who are only occasionally employed with the medical *personnel*, are not entitled to protection, and if captured are prisoners of war.² But British Army Service Corps soldiers attached to the medical service for the whole course of a campaign would be protected. All chaplains are now protected; the former Convention covered such only as were employed in hospitals or ambulances.

The German medical delegate at Geneva proposed that the medical *personnel* with regimental units should not be placed under the protection of the Convention, on the ground that it was exposed to all the risks of battle. The proposal found no supporters.³

The *personnel* must be exclusively engaged in sanitary duties to be protected.

German proposal as to *personnel* with regimental units.

¹ *Gen. Convn.* p. 28.

² Ariga, *op. cit.* pp. 182-7; Pillet, *op. cit.* p. 179.

³ *Gen. Convn.* p. 38.

The
personnel
must not
act
hostilely.

The protection afforded to the medical *personnel* is contingent on their not acting in a manner hostile to the enemy's interests. If a doctor heads a charge—as happened more than once in the Crimea¹—or if, being in the enemy's hands, he seeks out and transmits secret information to his own side, he becomes nothing but an ordinary active enemy in the former case, and nothing but a spy in the latter. I shall say something more on this point in my remarks on Articles XX and XXI.

Volun-
tary Aid
Societies.

Voluntary Aid Societies—Red Cross Societies, Ambulance Associations, etc.—have no claim to the protection of the Geneva Convention unless they are affiliated to the Army Medical Service and subject to military law. The British *Field Service Regulations* provide for voluntary medical units whose service is accepted in war, being brought under the orders of the military authorities and being required to adhere to the service regulations governing Army medical units.²

Informa-
tion
belliger-
ents must
furnish
to one
another
respecting
Aid
Societies.

As regards the second sentence of Article X, an incident of the Russo-Japanese War points to the desirability of furnishing the enemy with even more information about the voluntary associations a belligerent employs than is here provided for. After the occupation of Mukden, the horses of the Red Cross hospital and the arms of its *personnel* were carried off by the Japanese in the belief that it was a Russian military hospital. They could not be recovered before the Russian *personnel* left Mukden. "In order to obviate such misunderstandings," says Professor Ariga, "it would be desirable for the future to furnish the enemy, in good time and by every possible means, with information as to the existence and composition of the Red Cross sanitary formations."³

Neutral
Aid
Societies
cannot
claim
passage to
join the
enemy.

In the debate at Geneva on Article XI, Great Britain proposed that the consent of the enemy should be obtained to the employment of an Aid Society of a neutral Power, but a large majority declared against the proposal.⁴ The other belligerent is not, of course, bound in all cases to give the Aid Society facilities for joining the enemy. He is perfectly entitled to refuse passage to the ambulance or hospital if he has reason to

¹ Kinglake, *Crimea*, Vol. VI, pp. 268-9; Russell, *Crimea*, pp. 236, 260.

² *Op. cit.* pp. 108-9.

³ Ariga, *op. cit.* p. 203.

⁴ *Gen. Convn.* p. 39.

suspect that it is being used as a cover for sending military assistance or transmitting information to the enemy. Applications from a good many foreign ambulances for leave to join the Boers were refused by Great Britain in 1900-2. A Netherlands ambulance which was allowed passage in July, 1900, was found to be the bearer of correspondence for the combatant Boers, and other ambulances appear to have been little else than bodies of recruits masquerading as sanitary formations.¹ Italy declined to allow a Russian Red Cross Society to pass into Abyssinia in 1896.²

A neutral Aid Society ought to lend its assistance impartially to the two belligerents. Professor de Martens complains that while very material aid was rendered by England to the Turkish wounded in 1877-8, "never a voice was raised in Russia to invoke English assistance for the Russian wounded." When Mr. (later Sir) John Furley formed a committee in London to arrange for assistance being rendered to the Russian sick and wounded he met with little sympathy.³ No doubt it was felt that the Turks needed such help more than the Russians. But undoubtedly in such a matter as this an absolute impartiality is the fairer and more correct attitude to take up. The Swiss Red Cross Society refrained from sending an ambulance to Greece in 1897 because it was unable to send one to Turkey as well; instead, it sent assistance in money and *matériel*.⁴ In 1894 the Japanese refused to allow the Independent Society of the Red Cross of Tientsin to join the Chinese, on the ground that the Society proposed to help the Chinese wounded only. "This refusal," says Professor Pillet, "though strictly just, seems a little rigorous when one remembers that the Chinese army had organised no sanitary service."⁵ In 1899, the French Red Cross Society, while reserving its main assistance for the Boers, despatched the equipment for two surgical field hospitals to the British Red Cross Society.⁶

Under Article XII the *personnel* who fall into the enemy's hands may be forced by him to carry on their duties so long as

¹ Despagne, *op. cit.* pp. 371-3; Wyman's *Army Debates*, Session 1902, Vol. II, p. 214.

² Pillet, *op. cit.* p. 186, note.

³ De Martens, *op. cit.* pp. 493-4.

⁴ *R.D.I.*, September-October, 1897, p. 723.

⁵ Pillet, *op. cit.* p. 171, note.

⁶ Despagne, *op. cit.* p. 174.

They
should
help the
belliger-
ents im-
partially.

Treat-
ment of
personnel
who fall
into
enemy's
hands

their services are indispensable. Under Article 3 of the old Convention they had the right to withdraw at once in such circumstances, but this right was sometimes restricted by special agreements. The capitulations of Sedan, Strassburg, and Metz, in 1870, provided for the French surgeons remaining at their posts under the direction of the German authorities;¹ and paragraph 9 of the Port Arthur capitulation bound the Russian *personnel* of health and intendance to remain so long as the Japanese thought it necessary.² There are military objections to allowing the *personnel* to return to their own army when and how they choose; these objections are well illustrated by an incident of the Anglo-Boer War. Crabbe's column was hemmed in by a superior Boer force, under Malan, in February, 1902, between Rietfontein and Fraserburg in Central Cape Colony. It might have gone badly with the column but for the fact that Malan, having captured the British doctor, sent him through with the wounded to Fraserburg, whence Capper and Lund were enabled to relieve Crabbe the moment they heard of his being in difficulties.³

Restora-
tion of the
personnel.

The Convention of 1864 provided that the *personnel* should be delivered "to the outposts of the enemy." The new Convention alters this to "to their army or to their country." Difficulties arose sometimes over the old provision. The chief of the Russian Red Cross Society at Port Arthur, Eger-Meister Balachoff, who fell into the hands of the Japanese when the fortress capitulated, claimed that he had the right, under the unrevised Convention, to be sent back to the outposts of Kuropatkin's army, then still holding Mukden. The Japanese replied that, for him, the advance-post of the Russian army was not that of Kuropatkin at Mukden but that of Stoessel at Port Arthur, which no longer existed. He was eventually sent back to St. Petersburg.⁴ In other cases of the capture of Russian medical *personnel*, the Japanese appear to have interpreted the provisions of the Convention (of 1864) rather loosely. A doctor and some hospital attendants who were captured in

Restora-
tion of
Russian
personnel
by the
Japanese.

¹ German *Official History*, Part I, Vol. II, App. 49; Part II, Vol. I, App. 69; Part II, Vol. I, App. 78.

² Ariga, *op. cit.* p. 306.

³ *Times History*, Vol. V, p. 547.

⁴ Ariga, *op. cit.* pp. 341-3.

Manchuria in July 1904 were given their choice between being sent to the *Japanese* fore-posts, being sent to the railway station north of Ying-Keou, being sent to a neutral consul at that town, and being sent back to Japan. They chose the second proposal above.¹ The Russian *personnel* who fell into the hands of the Japanese at Mukden were empowered by Baron Oku to pass through the Japanese advance-posts in order to join the Russian army in the north. But here a difficulty arose; no vehicles, whether Chinese or Russian, could be found to transport the *personnel* and their effects; all had been taken for the purpose of the pursuit of the retreating Russians. Eventually, M. Gutschkoff, the head of the Russian *personnel*, sent the greater part of the men and nurses to the south, to Ying-Keou, and himself, with the rest, set out on foot for the north. "Our conduct in this case," says Professor Ariga, "amounted to a clear violation of the letter of Article III of the old Convention." But the military situation was responsible for the violation. "Imagine," he says, "a great army having to hand over to the enemy's advance-posts a hundred and twenty individuals belonging to the sanitary service, while it continues to pursue and attack that enemy."² Clearly the older Convention needed revising on this point.

The effects, instruments, arms and horses of the *personnel* are absolutely inviolable; they are not, like the *matériel* of Voluntary Aid Societies, liable to be requisitioned. The reason, as Professor Ariga points out, is that the *personnel* have only such effects and instruments as are strictly necessary, while a Help Society may have duplicates, reserves, or surplus stores. But the exemption of the property of the *personnel* may, as the same author observes, have the following undesirable result:—A belligerent may have very pressing need of an X-ray apparatus and such an apparatus may be in the possession of a member of the enemy's sanitary service who has fallen into the belligerent's hands; yet the latter cannot requisition the apparatus.³ In practice, however, it is probable that no difficulty would arise in such a case; it is extremely unlikely that the foreign surgeon would demur in the least to

¹ Ariga, *op. cit.* p. 197.

² *Ibid.* pp. 204-6.

³ *Ibid.* pp. 332-3.

placing his apparatus at the disposal of his captor-host, for a humanitarian purpose.

Payment
of the
personnel
while
in the
enemy's
power.

Article XIII gives doctors, orderlies, etc., who have fallen into the enemy's hands the privilege granted by Article XVII of the Hague *Règlement* to officers (only) who are prisoners of war. As the British delegates point out in their report on the work of the Conference, this Article is not wholly favourable to British medical officers, who are higher paid than those of any army except the United States; "foreign *personnel* in the hands of H.M. troops will be gainers, and British medical officers, in the hands, say, of the Chinese or Persians, may suffer considerable inconvenience."¹ On the other hand, the capturing belligerent might think it equally "inconvenient" to have to pay a foreign medical Captain, say, at a higher rate than a General of his own army. The rule as to payment is fair and reasonable, regarded broadly. No provision of the kind appeared in the Convention of 1864, but the Russian *personnel* (Army and Red Cross) were allotted pay by Imperial Decree while carrying on their duties under the Japanese authorities at Port Arthur after the capitulation. The scale varied from about 2s. 3d. a month for soldiers to £2 a month for subalterns and £10 for generals and assimilated ranks. None of the *personnel*, however, actually drew any pay from the Japanese.²

Captured
personnel
and ques-
tions of
discipline.

The Russian *personnel* who remained temporarily at Port Arthur were also subjected, for purposes of discipline, to the code in force in the Japanese army, and the Japanese surgeons in charge of the hospitals were authorised to punish the *personnel* in accordance with that code. Some infractions were also punished under the Russian disciplinary code. In both cases the sentences were carried out by the Japanese *gendarmes*.³ The question of discipline is not mentioned in the Convention, but it cannot be intended that the *personnel* shall be free from all control and liable to no disciplinary punishment while working under the enemy's direction. The position would have been clearer if a British proposal to the effect that the enemy should treat the detained *personnel* in the same way as he treats his own had not been negatived at the Conference.⁴

¹ *Gen. Convn.* p. 28.

² *Ibid.* p. 337.

³ Ariga, *op. cit.* p. 337.

⁴ *Gen. Convn.* pp. 28, 55.

Section IV.—Material.

ARTICLE XIV.

If mobile medical units fall into the hands of the enemy they shall retain their material, including their teams, irrespectively of the means of transport and the drivers employed.

Nevertheless, the competent military authority shall be free to use the material for the treatment of the wounded and sick. It shall be restored under the conditions laid down for the medical personnel, and so far as possible at the same time.

ARTICLE XV.

The buildings and material of fixed establishments remain subject to the laws of war, but may not be diverted from their purpose so long as they are necessary for the wounded and the sick.

Nevertheless, the Commanders of troops in the field may dispose of them, in case of urgent military necessity, provided they make previous arrangements for the welfare of the wounded and sick who are found there.

ARTICLE XVI.

The material of Voluntary Aid Societies which are admitted to the privileges of the Convention under the conditions laid down therein is considered private property, and, as such, to be respected under all circumstances, saving only the right of requisition recognised for belligerents in accordance with the laws and customs of war.

I have spoken of the distinction between "mobile units" and "fixed establishments" under Article VI. The former were protected under the old Convention only if they contained sick and wounded. The new Convention extends to them an absolute protection, subject only to the limitations (1) that they are not used to commit harmful acts, and (2) that the enemy may detain their *matériel* temporarily for his own sick and wounded. As Professor Holland remarks, the units mentioned in this Article "are to retain their *matériel*, etc., irrespectively of its character, i.e., although portions of it have been borrowed from military units or obtained by requisition from the inhabitants of the country."¹ Russia proposed in 1906 that the restoration of mobile units should be made the distinct duty of

Mobile units retain their material.

¹ Holland, *Laws of War on Land* (1908), p. 33.

the captor, but withdrew the proposal on the Japanese delegates suggesting that horses might be missing and that the captor should not have to provide them.¹ The *matériel* is to be sent back *as far as possible* with the personnel; it may be possible to send back the latter by a shorter and quicker route than the vehicles.² In choosing the route by which the *matériel* is to be restored, military considerations must be taken into account. "It is not necessary," says Professor Pillet, "to send back the ambulance by the shortest route, and the Germans are not to blame, as some have pretended, for sending back the French ambulances in 1870 by way of Belgium."³ Another case of the kind, equally legitimate, occurred in the same war, when a Prussian ambulance which fell into the hands of the French on the Loire, was sent back to Germany *viâ* St. Malo and England.⁴

Fixed
establish-
ments lose
their
material.

"Fixed establishments" are regarded as being unable, like mobile, self-transporting formations, to pack up and accompany the army they are attached to, when it withdraws. They are, as it were, "fixed to the soil," and when the invader acquires the territory by occupation, they pass to him too. But although confiscable by the enemy, they cannot, except in case of urgent military necessity, and then only if some alternative provision is made, be diverted from their purpose so long as they contain sick and wounded. Such a case of urgent military necessity would arise if a village were attacked, and it became necessary to remove the patients from a hospital in order to put it in a state of defence.⁵

Fixed
hospitals
belonging
to the
State
come
under the
*Règle-
ment*.

The British medical delegate at Geneva proposed to mention in Article XV "fixed hospitals belonging to the State." The proposal was lost by a unanimous vote against it, the Hague *Règlement* having assimilated such hospitals to private property.⁶

The
material
of Aid
Societies.

Article XVI gave rise to a keen discussion at the last Conference. Some of the Powers represented there held that the *matériel* of the Aid Societies should be treated as State property on the ground that such Societies were largely a "sort of

¹ *Gen. Convn.* p. 43.

² *Ibid.* p. 41.

³ *Op. cit.* pp. 180-1.

⁴ Referred to by Ariga, *op. cit.* p. 207.

⁵ *Gen. Convn.* p. 41.

⁶ *Ibid.* p. 47.

official organisation," and that if special privileges were granted to them (as compared with Army medical units), "they would gradually absorb all the medical services of the army, and there would be none purely military."¹ The delegates of the other Powers urged that Article XLVI of the Hague *Règlement* must be followed in legislating for the establishments of Aid Societies; that such Societies deserved special consideration; and that if their property were made liable to capture, "there would be a risk of drying up the sources of generosity on which the Societies depended."² The latter view was supported by twenty-nine delegates as against four for the former (Great Britain, Japan, Korea, United States), and as the Convention stands, the *matériel* of Aid Societies ranks as private property, not as property of Army medical units, mobile or fixed. "M. Renault, the *rapporteur* of the Conference, assumed, however, in his report, that *matériel* of Red Cross Societies found in mobile formations should be dealt with as laid down for State property and restored. Commanders in the field will, no doubt, interpret the Article liberally, and act in this manner for the sake of the sick and wounded, although, strictly speaking, *matériel* of Voluntary Aid Societies found in any field formation need not be restored, but may be requisitioned by the belligerent into whose hands it has fallen."³

Medical stores, drugs, etc., except those held by a mobile medical unit or a convoy of evacuation, are not protected by the Convention, and are subject to seizure just like any other army property. In the Crimea, drugs and medicines were seized,⁴ and so too were they in the Secession War.⁵ Sheridan's brigadier, G. A. Custer—the same who afterwards fell, with his whole command, in a battle with the Sioux—destroyed "nearly all the medical stores of Lee's army" in his expedition towards Richmond in May, 1864.⁶ The failure of drugs and medicines in the Confederate armies caused very great suffering. "Drugs

Medical stores, drugs, lint, etc.

¹ Observation of Colonel Akashi of Japan, *Gen. Convn.* pp. 42, 47.

² Observation of Professor Renault, French delegate, *Gen. Convn.*

³ Report of British delegates upon the work of the Conference, *Gen. Convn.* p. 28.

⁴ Nolan, *War with Russia*, Vol. II, p. 569.

⁵ See, for instance, Sherman, *Memoirs*, Vol. I, p. 285.

⁶ Sheridan, *Memoirs*, Vol. I, p. 375.

Excep-
tional
usage
referring
to such
stores,
etc.

had been declared contraband of war, the hospitals contained no anæsthetics to relieve the pain of amputation, and the surgical instruments, which were only replaced when others were captured, were worn out with constant use.”¹ In the Russo-Turkish War of 1877-8 the defenders of Plevna were in dire straits for quinine, lint, and linen bandages, the Russians having captured a supply of medical stores destined for the town.² But the rigour of the rule as to seizure has come to be softened by another usage, in accordance with which belligerents supply one another’s deficiencies in stores of this nature. One finds the chivalrous G. B. McClellan striving towards the light and setting an example of humanity in this matter to his brother commanders in the Secession War. In July, 1862, after the battle of Gaines’s Mill, he sent a boat-load of lint, bandages, chloroform, quinine, ice, etc., into Lee’s lines, “to be used” (he writes at the time) “at his discretion for the sick and wounded of both armies. I knew he would not, and could not, receive them for our men alone; therefore I can only do it in the way I propose, and I trust to his honour to apply them properly—half and half. I presume I will be accused now of double-dyed treason—giving aid and comfort to the enemy, etc.”³ During the Strasburg siege in 1870, General Uhrich sent a *parlementaire* to ask Werder for a supply of lint and bandages for the 600 wounded citizens, and Werder sent in an ample supply of both.⁴ Lord Roberts offered to send both surgeons and medicines into Cronje’s laager at Paardeberg in February, 1900, but as the latter would only accept the offer on the condition that the surgeons, once admitted, should not leave the laager until it had been removed to another place, Lord Roberts was compelled to withdraw his proposal.⁵ When representatives of the Japanese and Russian armies met at Port Arthur in December, 1904, to confer about the protection of the hospitals during the bombardment, Dr. Ariga, who was one of the Japanese representatives,

¹ Henderson, *Stonewall Jackson*, Vol. II, p. 346.

² Herbert, *Defence of Plevna*, p. 333; Greene, *Russian Army and its Campaigns in Turkey in 1877-8*, p. 265.

³ *McClellan’s Own Story*, pp. 453-4.

⁴ Hozier, *Franco-Prussian War*, Vol. II, p. 60.

⁵ German *Official Account of the War in South Africa* (Colonel Waters’ translation), Vol. I, pp. 263-4.

inquired of Eger-Meister Balachoff, in the name of the Japanese Red Cross Society, if the Russian Red Cross Society was in need of medical *matériel*, bandages, medicines, etc. The Eger-Meister thanked Dr. Ariga, and declared that "for the moment, all the hospitals were very rich in *matériel*, but that, as to the future, God alone could tell if he would not be obliged to accept the offer of Japan."¹

Section V.—Convoys of Evacuation.

ARTICLE XVII.

Convoys of evacuation shall be treated like mobile medical units subject to the following special provisions : —

1. A belligerent intercepting a convoy may break it up if military exigencies demand, provided he takes charge of the sick and wounded who are in it.

2. In this case, the obligation to send back the medical personnel, provided for in Article XII, shall be extended to the whole of the military personnel detailed for the transport or the protection of the convoy and furnished with an authority in due form to that effect.

The obligation to restore the medical material provided for in Article XIV shall apply to railway trains, and boats used in internal navigation, which are specially arranged for evacuations, as well as to the material belonging to the medical service for fitting up ordinary vehicles, trains, and boats.

Military vehicles, other than those of the medical service, may be captured with their teams.

The civilian personnel and the various means of transport obtained by requisition, including railway material and boats used for convoys, shall be subject to the general rules of International Law.

The old Convention gave "evacuations"—bodies of sick and wounded on the move, by rail, road, or river—an "absolute neutrality." The Convention of 1906, while assimilating them to mobile units, allows the enemy to break them up, if necessary, and to confiscate military vehicles not belonging to the medical service; while all requisitioned *personnel* and *matériel* are subject to the laws of war, *i.e.*, they may be requisitioned by the intercepting belligerent. The sick and wounded in the

Evacuations.

¹ Ariga, *op. cit.* p. 291; Kinkodo Co.'s *History*, p. 925.

Evacua-
tions in
the case of
sieges.

convoy are prisoners of war.¹ The teams of the medical service must be restored with the vehicles.² The last Conference considered it unnecessary to state that the medical *personnel* with a convoy shall not be permitted to obstruct military operations or to penetrate the enemy's lines.³ The question of evacuations from besieged or blockaded fortresses was also considered by the Conference, but not specifically legislated for. It was held that the absence of a definite provision in Article XVI was sufficient to show that a besieged commander has no war right to send out his sick and wounded, without the enemy's consent; and that, on the other hand, a besieger is not entitled to hamper the garrison by sending a convoy of wounded into the fortress.⁴ Even under the former Convention the besieger and the besieged, respectively, were held to be entitled to refuse passage and admittance to evacuations in the circumstances referred to. After the sortie from Paris of 29th of November, 1870 (when General Ducrot, who led the sortie, promised the Prussians—"I swear it before you, before the whole nation," he said in his proclamation—to re-enter Paris "only dead or victorious," and therein said the thing that was not), the Germans proposed sending some of the captured wounded back into Paris; but the latter refused to help the besiegers' policy of starving out the city and insisted on their rights, as (wounded) prisoners of war, of being sent into Germany.⁵

To claim
protec-
tion, the
convoy
must
not be
"mixed."

The convoy, to claim protection under the Convention, must not be one in which troops are included; it must consist of sick and wounded alone, with the necessary doctors, attendants, drivers, and guards. If a train contains fighting troops along with some sick and wounded men, then it is not entitled to protection. It is merely a troop-train, not an evacuation, and it must not fly the Geneva flag, which is to be hoisted only by medical formations entitled to the benefits of the Convention. This latter point was not quite clear under the old Convention, nor was it entirely certain that a belligerent was entitled to stop a hospital train, as he is now manifestly justified in doing, since he has the right to break up the evacuation and to con-

¹ *Gen. Convn.* p. 37.

² *Ibid.* p. 47.

³ *Ibid.* p. 28.

⁴ Holland, *Laws of War on Land* (1908), p. 35; *Gen. Convn.* p. 28.

⁵ Cassell's *History*, Vol. I, p. 572.

fiscate or requisition certain portions of the *matériel*. A famous incident of the Russo-Japanese War illustrates the war rights relating to evacuations very pertinently. In May, 1904, when the Japanese were disembarking in Liao-Tong, a Russian train was seen coming from Port Arthur and steaming to the north. A Japanese staff-officer signalled to the train to halt; it did so, but only to unfurl a Red Cross flag from one of the windows, after which it started again and made away with all speed. The Japanese detachment opened fire on it as it passed, but the train escaped. The incident was the occasion for an angry controversy between Russia and Japan, the latter seeing in it an abuse of the Geneva flag, while Russia complained that the Japanese had disregarded that emblem. Professor Ariga examines the whole affair impersonally and fairly, and his conclusions cannot but be approved as a sound statement of war law. He holds that, on the evidence, the train was a "mixed one," *i.e.*, one not entitled to be regarded as a convoy of evacuation. (Whether or not it contained Admiral Alexeieff and the Grand Duke Cyril, as was commonly reported at the time, is not certain.) It was, of course, no violation of the Convention for the Russians to put their wounded in a troop-train; but it was a violation for them to claim protection for the train, under the Red Cross flag, when it was not one exclusively given up to sick and wounded. He admits that, under the old Convention, the Russians may have thought themselves entitled to indicate the waggons containing sick and wounded by hoisting the Red Cross flag over them. Article XXI of the new Convention shows clearly that there is no such right. As to the firing upon the train by the Japanese, he thinks that in this there was no violation of the Convention, seeing that the train had disobeyed a signal to halt; it was perfectly entitled to disobey, but its doing so showed that the Japanese suspicions were correct and that it was not a genuine and exclusive evacuation. If a belligerent has the right (which is undoubted, under the new Convention at least) of stopping a hospital train, then he must have the right to compel it to stop. How is he to do so? Professor Ariga suggests alternative solutions. The intercepting commander may destroy the railway in front of the train, taking care to do it so as not to endanger the train itself; but,

The firing upon a train flying the Geneva flag at Port Arthur in 1904.

How may a hospital train be compelled to stop?

to do this, he must be master of the line. The other alternative, which Professor Ariga adopts, is to fire a warning shot in front of the train, and then, if that is ineffective, to fire upon the train itself. To fire on the train in such a case is not to violate the Convention; indeed, it is only to ensure that the Convention is not violated by the enemy, for it is the essence of the Convention that only *bonâ fide*, exclusive sanitary formations are protected.¹

Section VI.—The Distinctive Emblem.

ARTICLE XVIII.

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armies.

ARTICLE XIX.

With the permission of the competent military authority this emblem shall be shown on the flags and armlets (brassards), as well as on all the material belonging to the medical service.

ARTICLE XX.

The personnel protected in pursuance of Articles IX (paragraph 1), X, and XI shall wear, fixed to the left arm, an armlet (brassard) with a red cross on a white ground, delivered and stamped by the competent military authority and accompanied by a certificate of identity in the case of persons who are attached to the medical service of armies, but who have not a military uniform.

ARTICLE XXI.

The distinctive flag of the Convention shall only be hoisted over those medical units and establishments which are entitled to be respected under the Convention, and with the consent of the military authorities. It must be accompanied by the national flag of the belligerent to whom the unit or establishment belongs.

Nevertheless, medical units which have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Red Cross.

ARTICLE XXII.

The medical units belonging to neutral countries which may be authorised to afford their services under the con-

¹ Ariga, *op. cit.* pp. 178-81.

ditions laid down in Article XI shall fly, along with the flag of the Convention, the national flag of the belligerent to whose army they are attached.

The provisions of the second paragraph of the preceding Article are applicable to them.

ARTICLE XXIII.

The emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" shall not be used, either in time of peace or in time of war, except to protect or to indicate the medical units and establishments and the personnel and material protected by the Convention. (This Article has not been accepted by Great Britain.)

So closely is the Red Cross flag associated in one's mind with the protection of the sick and wounded in war that one forgets that there was a time when it was not the recognised emblem, and one is disposed to see no anachronism in its being introduced by a military writer¹ on the field of Gettysburg—a year before the first Geneva Conference was signed [*i.e.* 1864]. As a matter of fact, the sanitary formations in the Secession War displayed yellow flags. At one time hospitals flew black flags, at another white ones—now respectively the emblems of the pirate and the *parlementaire*. For hospitals were inviolable long before 1864. The gospel of the protection of the sick and wounded had been preached and practised years before Henri Dunant wrote; his peculiar glory is that in his hands "the thing became a trumpet."

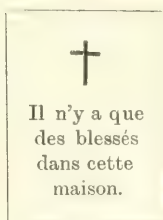
The heraldic origin of the Red Cross emblem is expressly described in Article XVIII in order to remind Mussulman countries that it has no religious significance. Mahommedan troops have always looked askance at the use of the Cross—the symbol of Christianity—and some writers have suggested that some different emblem—a star, for instance—should be substituted for it on the Geneva flag.² In the war of 1877–8 the Turks themselves hoisted the Red Crescent over their sanitary formations, and to this Russia agreed on condition that another distinctive sign should be used as well, since the Red Crescent was liable to be confounded with the Egyptian flag.³

¹ Batine, *Crisis of the Confederacy*, p. 251.

² See Bonfils, *op. cit.* sec. 1115.

³ De Martens, *op. cit.* pp. 234–5.

In the late war in the East the Red Cross flag itself is said to have been mistaken, at a distance, for the Japanese national flag.¹ Before Osman evacuated Plevna in December, 1877, he had the Red Crescent hoisted over all houses containing sick and wounded, and the following placard exhibited on the doors:



Here, it will be noticed, both Cross and Crescent were used.² Turkey has now acceded to the Convention of 1906, subject only to the reservation that the Turkish armies will themselves fly the Red Crescent.

The size of flag, etc., not stereotyped.

Nothing is laid down as to the size of the flag, of the brassard, or of the emblem thereon. "It was decided," we are told in the Summary of Proceedings, "not to give an exact description of the Red Cross, as any slight variation from it might then be used without incurring any penalty for 'abuse.'"³ Perhaps it might have been specified with advantage that the Red Cross must be visible. Professor De Martens records that the Turks used a huge flag in 1877 with a tiny Red Crescent thereon, the latter being invisible at artillery range.⁴

The Geneva flag must not be hoisted over civil hospitals, etc.

Article XXI makes it clear that the Red Cross flag must not be hoisted over civil hospitals or any buildings or ambulances other than those referred to in the Convention. Article XXVII of the Hague *Règlement* provides for "hospitals and other places where the sick and wounded are collected" being protected as far as possible during a bombardment; such buildings and the patients in them, as well as infirm persons generally, are further safeguarded by Articles XLVI and LVI of the *Règlement*, as well as by the general principle laid down in the St. Petersburg Declaration as to the sole legitimate end

¹ Ariga, *op. cit.* p. 249.

² Herbert, *Defence of Plevna*, pp. 374-5.

³ *Gen. Convn.* p. 44.

⁴ *Op. cit.* p. 450.

of war. It has, however, been the practice for civil hospitals to fly the Geneva flag, especially in bombarded cities. I have shown in Chapter VI how, during the Paris bombardment, Trochu, "the patient governor," lost his patience for once over the shelling of the hospitals, and how Moltke found one of the seven tongues in which he ordinarily kept silence to protest indignantly against the insinuation that the shelling was deliberate. In all wars recriminations arise on this subject, but I have not been able to find any case in which the assailants took up the position that the civil hospitals were not protected by the Geneva Convention; still less that the besieged committed a breach of the Convention in hoisting the Red Cross flag over them. Under the present Convention, at least, both positions are tenable.

The Red Cross flag protects hospitals and ambulances; the *brassard* protects individuals. After one of the encounters outside Port Arthur (July, 1904), a man bearing a Red Cross flag came out with two other men from the Russian lines to carry off the dead in front of the Japanese position. The Japanese soldiers, seeing the flag, did not fire upon them, but the staff of the division concerned (the Eleventh) thought that they might have done so, since it was a matter of importance to prevent any of the enemy approaching and inspecting the Japanese position. Professor Ariga was asked for his opinion and replied that individuals were not entitled to claim inviolability by carrying the Geneva flag, which only protected sanitary formations, and that the men might properly have been fired upon. The divisional general then put the further question—one arising under Article IX rather than under Articles XX and XXI:—

Individuals are protected by the *brassard* or badge.

The case of individuals wearing the *brassard* who approach a position the enemy wishes to keep secret.

If there is something which we wished to conceal from the enemy and these men have seen it, even if they wear the *brassard* and are without arms, may we not command them in a loud voice to halt and then, if they do not halt, fire upon them?

Professor Ariga answered:—

Yes, you have the right to shoot them in that case; it is the same as with a *parlementaire* who approaches your line and does not halt in spite of your signals.

He goes on to point out that the medical *personnel* must not act in such a way as to harm the enemy's interests. On the field of battle there may be places which such persons cannot be allowed to approach. If they do, they must either be captured and detained in order that the military secret in question may not be divulged; or, if it is impossible to capture them, fire may be opened in their direction and if that does not stop them, they may be directly fired at.¹ It is a case in which the *subauditor* of Article IX—that the medical *personnel* must not, any more than sanitary formations, be the cause of damage to the enemy if they are to enjoy his protection—must, for reasons of military necessity, override the provision that the *personnel* “shall be respected and protected under all circumstances.”

No sign
for night
is pro-
vided for.

The question of a sign for night—such as a lantern with coloured glass—was raised at the Conference but dropped without any decision being reached.²

No stan-
dard
colour for
vehicles,
trains,
etc.

A proposal of the British delegation that all vehicles, trains, etc., belonging exclusively to the medical service should be painted white, with as large a Red Cross displayed upon them as their dimensions permitted, found no supporters.³ Presumably it was thought that such a provision might be made the pretext for evasions of the obligations imposed by the Convention.

Flagstobe
hoisted
by neutral
ambu-
lances.

Article XXII provides that neutral ambulances shall fly, with the Red Cross, the national flag of the belligerent they are attached to. It has been usual for such formations to fly their own national flag as well; they did so in the Franco-German, Turco-Russian (1877–8), Serbo-Bulgarian, and Anglo-Boer Wars. In favour of this practice was the consideration that an individual might desire to make use of a neutral ambulance rather than one belonging to the enemy and the foreign flag indicated which formations were neutral ones.⁴ Against it were the far more weighty objections that the Red Cross flag was more likely to be obscured by the presence of two additional flags than of one, and that wounded men, unfamiliar with foreign national

¹ Ariga, *op. cit.* pp. 189–191.

² *Gen. Coun.* p. 43.

³ *Ibid.* p. 30.

⁴ See Despagnet *op. cit.* p. 374.

standards, might distrust these emblems and avoid the neutral ambulances instead of seeking their hospitality.¹

Articles XXIII, XXVII, and XXVIII (see later) have not been accepted by the British Government; there being constitutional difficulties in the way of an unconditional undertaking to carry out the legislation referred to, especially within a fixed time limit. But the British delegation expressed its complete sympathy with the subject of the provisions of these Articles.

Unauthor-
ised use of
the Red
Cross in
peace and
war.

Section VII.—Application and Carrying out of the Convention.

ARTICLE XXIV.

The provisions of the present Convention are only binding upon the Contracting Powers in the case of war between two or more of them. These provisions shall cease to be binding from the moment when one of the belligerent Powers is not a party to the Convention.

ARTICLE XXV.

The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding Articles, as well as for cases not provided for, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

ARTICLE XXVI.

The Signatory Governments will take the necessary measures to instruct their troops, especially the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population.

Section VIII.—Prevention of Abuses and Infractions.

ARTICLE XXVII.

The Signatory Governments, in countries the legislation of which is not at present adequate for the purpose, undertake to adopt or to propose to their legislative bodies such measures as may be necessary to prevent at all times the employment of the emblem or the name of Red Cross or Geneva Cross by private individuals or by Societies other than those which are entitled to do so under the present Convention, and in particular for commercial purposes as a trade-mark or trading mark.

The prohibition of the employment of the emblem or the names in question shall come into operation from the date

¹ See *R.D.I.* September–October, 1897, p. 724.

fixed by each legislature, and at the latest five years after the present Convention comes into force. From that date it shall no longer be lawful to adopt a trade-mark or trading mark contrary to this prohibition. (This Article has not been accepted by Great Britain.)

ARTICLE XXVIII.

The Signatory Governments also undertake to adopt, or to propose to their legislative bodies, should their military law be insufficient for the purpose, the measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the wounded and sick of armies, as well as for the punishment, as an unlawful employment of military insignia, of the improper use of the Red Cross flag and armband (brassard) by officers and soldiers or private individuals not protected by the present Convention.

They shall communicate to one another, through the Swiss Federal Council, the provisions relative to these measures of repression at the latest within five years from the ratification of the present Convention. (This Article has not been accepted by Great Britain.)

The remaining provisions.

No remark of any importance arises out of Sections VII and VIII. Section IX (Articles XXIX to XXXIII) deals with the ratification of the Convention, with its denunciation (a year's "notice" must be given), and with the subsequent accession of Powers not originally signatory. Article XXXI provides that:

"The Convention of 1864 remains in force between such of the parties who signed it who may not likewise ratify the present Convention."

CHAPTER XIV

THE SANCTION OF THE LAWS OF WAR.

Conventional Law of War.—None.

As I have said in the first chapter of this book there is no machinery for compelling compliance with International Law. ^{Strictly there is no} International Law will never have a real "sanction," that is, it ^{"sanc-} will never be really "law" in the strict Austinian sense, unless ^{tion" for} and until the various nations surrender some of their sovereign power to one supreme ruler who shall have the right and the means to execute his decrees. Such a "High King"—a revived Pope, for instance, with a "ten-power standard" army and fleet and the right to refrain the spirit of refractory princes, not by excommunicating them, but by marching against them, smiting them hip and thigh, and imprisoning them in the Vatican—would certainly dispense a "law," but whether that law would then be International Law is doubtful. For, practically, so far as foreign affairs were concerned, the nations would not be independent and sovereign. As things are at present, there is no "sanction" in the legal sense at all. Observance of the rules of International Law rests upon the conscience of each nation and the might of its arm. If a nation wrongs another in peace—if it violates the rules of International Law which obtain between friendly nations—the other may secure redress by threatening or opening hostilities; but when the two nations are already at war, obviously this method of redress is no longer possible. If the laws of war are broken, there are three possible methods of obtaining satisfaction to be considered:—

(1) The damaged belligerent may himself punish the offending enemy soldiers or nationals.

(2) He may lodge with the other belligerent a protest against

Three modes of obtaining satisfaction for infractions.

the infraction, and if it is a case in which an indemnity will compensate for the damage, claim one under Article III of the *Hague Convention* (the diplomatic prelude to the *Règlement*).

(3) If the actual offender cannot be reached and if the other belligerent has refused satisfaction, the damaged belligerent may resort to reprisals.

Punish-
ment of
offenders
against
the laws
of war

As to the case coming under (1) above, nothing need be said, except that the punishment of offenders, however manifest and grave their offence, should take place only after a fair trial—by a military court, a council of war, or whatever kind of court has cognisance of offences against war law in each army; and that sentences of death should invariably be subject to the approval of the commander-in-chief. The question of a man's life or death is as grave as the question of levying a contribution and ought to be decided by no less supreme and responsible an authority. It is not always easy, under the unfavourable conditions of war, to secure that detachment of spirit and judgment, that freedom from passion and emotion, which ought to mark every judicial process. But the very necessity for a trial and for the case against the accused being set down in writing (as is usual) makes for justice. Perhaps some day one may see a specialised body—a very few would suffice—of “war law judges” in each army, before whom all cases of violation of the laws and usages of war shall be heard.¹

Satisfac-
tion by
way of
indem-
nity.

Article III of the *Hague Convention* speaks of an indemnity, being paid in “proper cases.” What “proper cases” would be is not defined; presumably cases in which the damage caused by the violation is capable of being reduced to a money basis, such as a case of damage to property. The aggrieved belligerent would still be entitled to punish the offenders—if he could capture them—in such cases as treachery and the use of poison.

Reprisals.

The third method of securing compliance with the laws of war is a method to be adopted only in the last resort. Reprisals are a survival of the *lex talionis*—an eye for an eye, a limb for a limb, a life for a life. They are the very saddest of all the necessities of war. “History,” says Professor De

¹ As to the necessity for a trial of offenders against the laws of war, see Article 84, *Oxford Manual*; Article 12, *American Instructions*; Bluntschli, *op. cit.* sec. 548; *French Manuel à l'Usage*, p. 90; *British Manual*, p. 45; Pillet, *op. cit.* p. 209.

Martens, "abounds in numberless examples of the most atrocious cruelties committed under the pretext of reprisals."¹ Yet one cannot see how they can be entirely done away with. When the question of reprisals was discussed at Brussels, Baron Lambermont of Belgium, whose proposal to "sacrifice" the proposed Article "on the altar of humanity" was unanimously accepted by the committee, pointed out that whatever care were taken to soften the law as to reprisals, the principle—an odious one—would still remain.² The enormous difficulty of the subject—one bearing upon the mitigation of the evils of war as much as any subject possibly can—may be judged from the fact that the Brussels Conference shrank from legislating for it and that the two Hague Conferences have not touched the question at all. At Brussels it was felt that "occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly."³ But no such objection to its being discussed existed in 1899 or in 1907. The words which Baron Jomini used at Brussels are both true and noteworthy, though one may doubt whether the suppression of all reference to the subject is likely to have such a "serious moral bearing"—such a deterrent effect upon resort to the practice—as he anticipated. The necessity for resorting to reprisals is recognised in all the service manuals; the only effect of the suppression of the Brussels Article has been that each manual gives its own rules instead of a universally-binding, stereotyped set. Baron Jomini's words were :

I regret that the uncertainty of silence is to prevail with respect to one of the most bitter necessities of war. If the practice could

¹ De Martens, *op. cit.* p. 423. Perhaps the worst war in this respect, *i.e.*, the war in which each side deliberately practised inhumanities on the greatest scale by way of reprisals, was the Anglo-American War of 1812-14. The American troops in Canada, the English troops in the States, were guilty of an endless number of barbarities for which—given an original outrage which could not be so excused—each party was able to find ample justification in the acts of the other. A "vicious circle" of reprisals was established which neither side had the magnanimity to break. It was asked at the time in the English House of Commons why the scalping of prisoners was not resorted to in wars with the Red Indians, or the enslavement of them in wars with the Barbary Corsairs, if the British retaliation for the excesses of the American militia in Canada was good war. (Hewson Clark, *History of the War*, published 1817, p. 74.) ² Brussels B.B., p. 281. ³ *Ibid.* p. 178.

be suppressed by this reticence I could but approve of this course. But if it is still to exist this reticence may, it is to be feared, remove any limits to its exercise. Nevertheless, I believe that the mere mention in the Protocol that the Committee, after having endeavoured to regulate, to soften, and to restrain reprisals, has shrunk from the task before the general repugnance felt with regard to the subject, will have a most serious moral bearing. It will, perhaps, be the best limitation we have been able to affix to the practice, and especially to the use which may be made of it, in future.¹

The rules of the Institute as to reprisals.

The rules drawn up by the Institute of International Law and given in the *Oxford Manual* (Articles 85 and 86) may be regarded as the most authoritative expression of the International Law as to reprisals; they are the "common denominator," as it were, of the rules on the subject given in the various army manuals.

Reprisals are formally forbidden in all cases in which the wrong complained of has been redressed.

In the grave cases in which reprisals appear to be an imperious necessity, the manner of inflicting them, and their extent, must not be disproportioned to the infraction committed by the enemy.

They can only be inflicted under the authority of the commander-in-chief.

They must in all cases take account of the laws of humanity and morality.

De Martens' proposal.

Another rule, the justice of which is evident, is suggested by Professor De Martens: viz., that if it is impossible to punish the actual culprits, reprisals ought in the first instance to be inflicted upon the commanders and officers of the enemy's troops.²

The reprisal need not be identical in character with the infraction.

There is nothing to prevent the act of reprisals differing from that complained of. "Circumstances do not always allow of replying to an infraction by an identical infraction, and it is well, too, to have the power to limit oneself, on occasion, to measures of reprisal less grave and therefore different."³ "Reprisals need not resemble in character the offence complained of. They may be exercised against persons or property."⁴ Either combatants or non-combatants may be the victims of reprisals.

¹ Brussels B.B. p. 178.

² *Op. cit.* p. 428.

³ French *Manuel à l'Usage*, p. 26.

⁴ Professor Holland's note in *British Manual*, p. 46.

One finds instances in the Secession and Franco-German Wars of reprisals being exercised or threatened against prisoners of war.¹ M. Paul Carpentier holds that to execute prisoners is to break the *quasi*-contract made with them when they agreed to surrender;² but most jurists would, like Professor Pillet,³ give the captor the power to adopt such a measure in very extreme cases. The German manual sanctions the killing of prisoners in unavoidable cases of urgent necessity.⁴ "Every prisoner of war," says Article 59 of the *American Instructions*, "is liable to punishment inflicted by way of reprisals." "When the infraction complained of," says M. Bonfils, "emanates from soldiers, it is on soldiers especially that reprisals must be inflicted";⁵ and the right to inflict reprisals—to retaliate—must entail the right to execute in very extreme cases. Otherwise there would be no effective means of checking the enemy's very worst excesses.

As to non-combatants there is a difference of opinion. Some writers, like MM. Bonfils and Pillet, would deny commanders any war right of inflicting reprisals on peaceable citizens. But practice is all against their view. Every war has seen reprisals inflicted upon citizens, whether by way of the destruction of their property, the exaction of fines, or the seizure of their persons. In many wars their lives have been endangered through their being held accountable for acts committed by others. And this brings me to the difficult question of *hostages*—a question which has assumed a great magnitude and importance in modern wars. As I have said before, it is usual for an occupant to take hostages to secure compliance with his requisitions or as security for the good behaviour of the inhabitants of an occupied town. In the Secession War the Confederates carried off a number of unoffending citizens of Maryland and Pennsylvania and detained them in the south until the end of the war; their object being to hold them as security against the arrest or

Reprisals
upon
prisoners
of war.

Reprisals
exercised
against
non-com-
batants.

The ques-
tion of
hostages.

¹ See Bowman and Irwin, *Sherman and his Campaigns*, p. 355; Cassell's *History*, Vol. II, p. 48.

² French translation of the *Kriegsbrauch im Landkriege*, pp. 176-7.

³ Pillet, *op. cit.* p. 149. The British official *Laws and Customs of War*, (p. 46) contemplates the infliction of reprisals upon prisoners of war "in extreme cases."

⁴ *Kriegsbrauch im Landkriege*, p. 16.

⁵ *Op. cit.* sec. 1024.

ill-treatment by the Union Government of the Secession sympathisers—the “copperheads,” as they were called—resident in the north.¹ Again, in 1870, the Germans seized as hostages forty notable inhabitants of Dijon, Gray, and Vesoul, in retaliation for the decision of the French Government to treat the crews of German merchantmen as prisoners of war, a decision which Germany held to be contrary to International Law but which has the support of practically all jurists.² The seizure in these cases was, in itself, a reprisal. But one sees the principle of retaliating upon non-combatants more clearly in another class of cases illustrated by events of the two wars just referred to, as well as of the Anglo-Boer War. The kind of case I mean is where a non-combatant is exposed to danger of life or limb with the object of preventing the enemy (active or passive) resorting to certain acts which the other belligerent considers illegitimate. As I have shown in an earlier chapter, the Federal Commanders of 1861–5 regarded the use of land mines or “torpedoes” as illegitimate in certain circumstances. Sherman ordered that, in such a case, the suspected place should be tested by a car-load of prisoners, *or of citizens implicated*, being drawn over it by a long rope.³ This system of “prophylactic reprisals” appears to have attracted no special attention until the Franco-Prussian War. It was in that war that it became one of the burning questions of modern war law. The attempts to wreck the trains in Alsace and other occupied districts in France became so frequent that, to stop them, the German authorities issued an order that the trains should

Hostages
and “pro-
phylactic
reprisals.”

The prac-
tice in the
Secession
War ;

in the
Franco-
German
War ;

be accompanied by inhabitants who are well known and generally respected, and who shall be placed upon the locomotive, so that it may be made known that every accident caused by the hostility of the inhabitants will, in the first place, injure their countrymen.

At Nancy the first hostage was the venerable President of the

¹ Draper, *op. cit.* Vol. III, p. 501.

² See Count de Chaudordy's circular in Cassell's *History*, Vol. I, p. 221 ; *Kriegsbrauch im Landkriege*, p. 49. For other cases of the seizure of hostages in this war, see Sutherland Edwards, *op. cit.* pp. 268–9.

³ See Bowman and Irwin, *op. cit.* pp. 235–6. McClellan made his prisoners search for the torpedoes in such a case (*McClellan's Own Story*, pp. 326–7), as also did Sheridan (*Memoirs*, Vol. I, pp. 380–1). See Grant, *Memoirs*, p. 558.

Court of Appeal, M. Leclair ; another notable citizen who was "invited" to go travelling was Procureur General Isard, who, escorted by two Prussian gendarmes, had to mount the tender and travel to Luneville, where his colleague in that town took his place. The President of the Chamber of Commerce, a judge, and a barrister, occupied the post of danger on other occasions.¹ The German practice was revived by Great Britain in the South African war. I have already quoted the Proclamation issued by Lord Roberts on the subject.² The Proclamation was soon repealed—by Proclamation No. 9 of 27th July, 1900³—but the practice continued. One finds Mr. Brodrick, Secretary for War, upholding the legitimacy of the practice in the House of Commons as late as 26th March, 1902. Mr. Bryce had declared that

and in the
Anglo-
Boer War.

the practice is contrary to the Hague Convention [*Règlement*] and contrary to the general usages of civilised warfare. (Several hon. members : No, no.) Unquestionably. The only parallel I can find for it is the case which occurred in the Franco-Prussian War of 1870, under somewhat different circumstances.

Mr. Brodrick replied that Mr. Bryce's view was not that held by those who advised the Government in this matter, and he declared that there was another precedent for the practice than that of the War of 1870–1, which, however, he declined to name, "because of the susceptibilities which are aroused by statements of this kind in this House." "I should not have far to go," he said, "to look for another example which would amply justify us in the course Lord Kitchener thought it necessary to take."⁴ He was referring, I think, to the cases in the Secession War, in which the principle was the same though the circumstances were somewhat different. But, indeed, he might have quoted the Boers themselves as his authority for practices of the kind, if the legality of the thing

¹ Hozier, *Franco-Prussian War*, Vol. II, p. 90.

² *Vide supra*, p. 124.

³ *Proclamations of Lord Roberts*, (Cd. 426) p. 12. The original Proclamation, authorising the carrying of hostages on trains, was No. 6 of 19th June, 1900 (*ibid.* p. 11).

⁴ Wyman's *Army Debates*, Session 1902, Vol. II, pp. 196, 200. See also *do.*, Vol. I, pp. 595, 610, 782, for further references in the House to this question of carrying hostages on trains.

was to be decided by precedents and not on the higher ground that "right is right." When the Boers approached Aliwal North in November, 1899, before crossing the Orange River, they "sent a messenger to fetch Mr. Hugo, the magistrate, and ordered him to stand on the middle of the bridge with his assistant and chief constable, while the commando crossed, as a precaution in case the bridge might be mined."¹ This was a perfectly clear case of "prophylactic reprisals"; the enemy non-combatants were placed in the post of danger, not on a locomotive, but on a bridge, as a kind of security against what was regarded as an illegitimate act on the enemy's part.

Legiti-
macy of
the prac-
tice con-
sidered.

Some
French,
English,
and
German
views.

The practice of war, then, may be affirmed as good evidence in favour of this usage of exposing civilian hostages to danger by way of preventive retaliation. What about theory and abstract justice? Theory has condemned the practice almost unanimously.² "Their proceedings," says Professor Pillet, referring to the German practice, "resemble that of the mutineers who place women and children in the first rank, hoping that the troops will not dare to fire upon them. Fighting ought to be confined to soldiers, and there is little military virtue in making use of non-combatants as a shield against the enterprises of the enemy." "It would not be more unjust," says Professor Westlake, "if civilians of the enemy State were placed in the front of battle in order to induce the enemy's troops to withhold their fire." The German Official Manual admits that the method adopted to stop train wrecking in 1870-1 was a cruel one, but justifies it on the ground that it was completely successful in its object, no accidents occurring to trains which carried notables, whereas all previous attempts to prevent "the undoubtedly irregular, even criminal, conduct of a fanatical population" had ended in failure.³ Both of the views I have presented—Professors Westlake's and Pillet's—the general view on the one side, the German official jurist's on the other—

¹ *Times History*, Vol. II, p. 292.

² See Bonfils, *op. cit.* sec. 1145; Pillet, *op. cit.* p. 213; Hall, *International Law*, p. 475; Bluntschli, *op. cit.* sec. 600; Westlake, *International Law*, Part II, p. 102. On the other hand, see Oppenheim, *International Law*, Vol. II, pp. 272-3, who upholds the practice.

³ *Kriegsbrauch im Landkriege*, pp. 49-50. See also Busch, *Bismarck*, Vol. II, pp. 121-2.

appear to me to miss the true solution of this difficulty, and to miss it, too, for the same reason in each case. Both views, that is to say, are too absolute, general, and dogmatic; both fail to take account of the varying circumstances in which the practice in question may be resorted to. Mr. Bryce, too, spoke beside the point, I think, when he described the practice as contrary to the convention and usage of war. For the whole question of hostages is bound up with the question of reprisals, and reprisals have not been legislated for, nor is there any universal usage which would warrant one in saying that "prophylactic reprisals" of the kind I am dealing with are banned by customary war law. If reprisals are legitimate at all and if they may be inflicted upon a civil population, then to retaliate as far as possible *in kind* is proper and equitable. But reprisals can only be inflicted for a violation of the laws of war. They must not be inflicted to prevent the enemy carrying out a proper act of hostilities. Now, as I have shown in Chapter IV, railway wrecking is, generally speaking, a perfectly legitimate act of war, but it must, like any other such act, be carried out by the enemy's proper agents of war—his combatant troops. If a non-combatant interferes with a railway line, he lays himself open to extreme and summary punishment. It is quite fitting that he should be the first to suffer for such interference, or (reprisals being allowed) for any interference effected by other non-combatants. If, therefore, one confines one's remarks to a district in which there is no possibility of the damage done to the line having been effected by the enemy's raiding parties or in which such raiding parties could not achieve their purpose without the inhabitants' assistance or connivance, I hold that no objection arises under the laws and customs of war to the carrying of hostages on trains. To compare the measure to placing women and children in the forefront of a battle is to confuse the issue; for to expose women and children in such a way is to seek to prevent the enemy doing what he has a perfect right to do, while carrying hostages on a train, under the restricted conditions I refer to, is to seek to prevent non-combatants meddling treacherously in hostilities and thereby violating war law. As I have said in Chapter IV, there was little substantial reason for assuming that the railway lines in

The circumstances of the case must be examined before such preventive reprisals can be condemned.

the occupied parts of France in 1870-1 could not have been injured without the help or connivance of the inhabitants and still less reason for this assumption in the case of the Boer Republics. Therefore, so far as the question of the right or wrong of the practice adopted in these two wars is concerned, I agree with the majority of writers in casting my vote against it—the conditions which would have legalised it not being proved to have been in existence. But that is not to say that it would not have been proper and justifiable under circumstances not so very dissimilar from those in which it was actually resorted to.

CHAPTER XV

THE NEUTRALITY CONVENTION

Conventional Law of War.—Hague Convention of 1907
relating to Neutrality in Land War.

Section I. The Rights and Duties of Neutral Powers.

ARTICLE I.

The territory of neutral Powers is inviolable.

ARTICLE II.

Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

ARTICLE III.

Belligerents are likewise forbidden to :

- (a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea ;
- (b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE IV.

Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

ARTICLE V.

A neutral Power must not allow any of the acts referred to in Articles II to IV to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

ARTICLE VI.

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

ARTICLE VII.

A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

ARTICLE VIII.

A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals.

ARTICLE IX.

Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles VII and VIII must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by Companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

ARTICLE X.

The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

The Neu-
trality
Conven-
tion.

The Neutrality Convention is really an expansion of four Articles which appeared in the *Règlement* of 1899 and which dealt with internment of a belligerent's troops in neutral countries. The Articles referred to were quite out of place in a body of Regulations intended to be issued as instructions to the troops of the signatory Powers, and when the fresh Articles relating to neutrality were added in 1907, the existing Articles were removed from the *Règlement* and, together with the additional Articles, formed into a separate Convention. The signatory Powers are bound by the precise provisions of this Convention, just as they are by those of the Geneva Convention.

Neu-
tral-
ity is not
impar-
tiality.

Neutrality is a blissful state of *dolce far niente*. The duties of neutral Powers, said M. Leon Bourgeois at the Hague three years ago, may be summed up in the obligation to do nothing.

Neutrality is not impartiality, as the early jurists held it was. A neutral State may be on such friendly terms with each of the two parties to a struggle that it is quite willing to help both of them—to allow them to fight on its territory or move troops over its railways, etc.—but if it was as willing as Barkis it must not do anything of the kind. It must stand aside; the fight is not its concern. It is a practical impossibility to help both belligerents in an exactly equal degree; the same measure of assistance may, from the force of circumstances, mean much more to one than to the other, and therefore the neutral must help neither. This is the first great principle of neutrality: the neutral State, as such, must stand rigorously aloof from the conflict.

In other words, when two nations settle their differences by trial of battle, third parties—other nations—must not break the ring. A neutral Power must extend no aid or assistance, in any way whatever, to either belligerent. It must not lend either party money or hire its troops out to him, or sell him munitions, or suffer him to cross its frontiers for a strategical purpose. In its capacity as a State, friendly to both parties, and within the sphere of its ordinary governmental activity, it must take reasonable steps to insure that a belligerent suffers no prejudice from its acts or omissions. I shall return to this point again; what I wish to lay stress on here is that neutral Governments have a heavy responsibility laid upon them to abstain from interfering, in any way whatever, in an international struggle to which they have no desire to become active parties. There is no half-way house between belligerency and neutrality. “Benevolent neutrality,” as Lord Granville pointed out to Count Bernstorff, the North German Ambassador in England, in 1870, is a conception incompatible with the nature and idea of neutrality; in fact it is not neutrality at all. If the neutral State fails in its obligations the aggrieved belligerent can call it to account, and, if the neutral continues to render aid to the other belligerent, it commits a hostile act which warrants the prejudiced party in regarding it as an active ally of the enemy State. In other words, the remedy is international. A State has wronged a State and the latter can secure redress by resorting to “the last reason of kings.”

Neutral States, as such, are bound to help neither belligerent in any way whatever.

“Benevolent neutrality” is a contradiction in terms.

The relations of belligerent States and neutral individuals.

The belligerent's remedy is in this case not international; he strikes directly at the neutral individual.

Reasonableness of the rule.

So far for the relations between neutral and belligerent States. I now come to a much more complex question—the relations between belligerent States and neutral individuals. The chief concern that neutral nationals have with a belligerent government is in the matter of *trade*; and here the interest and the convenience of neutral and belligerent States alike have led to the adoption of a rule which may be called the second great principle of neutrality. It is this: Neutral nationals who cannot be considered as acting for their State or clothed with any official character, enter into relations with a belligerent without involving their State's neutrality; if, for instance, they trade with him, the other belligerent has the right to prevent their doing so or to confiscate their merchandise, but not to call upon the neutral Government to do so on his behalf. They engage in commercial transactions at their own risk and these transactions may be harmful to one of the belligerent parties, but the latter has no *international* remedy. He can only take the law into his own hands, so to speak, and strike directly—not through the neutral Government—at the neutral national whose acts are harmful to him. The rule is a wise one. No neutral State, however bureaucratic, could have such an extensive and unflinching control over the acts of its nationals (and foreigners resident in its territory are, for this purpose, on the same footing as subjects) as to warrant its being made officially responsible therefor. It is an equitable rule, too. It is impossible to insulate the shock of a modern war. Its effects are never confined to the belligerent parties; they touch the whole world, agitate every bourse, disorganise every trade, make themselves felt through all the channels and ramifications of business and commerce. Neutral nationals suffer enough from the very fact that two nations are at war without having their losses added to by the action of their own Government. Were the latter to prohibit and prevent all commerce with the belligerents, it would bring total ruin on many of its citizens. As Sir Edward Creasy points out, the principle that neutral subjects should be allowed by their own Governments to carry on their usual trades, professions, or callings, is a perfectly just one; and it is not the less just when the callings in question are such as those of “the gunmakers of Birmingham and Liège, of the sword-

cutlers of Sheffield, and of the shipwrights of Greenock and Amsterdam.”¹ These men do no wrong to their State when they supply a warring foreign nation with the munitions which it comes into the market to purchase. Why should a manufacturer of Essen or Glasgow be debarred by his own Government from selling his merchandise to, say, a Chilian agent who comes to buy it and to pay a good price for it, because there is a war on the other side of the world between Chili and Peru? The affair is one which concerns only the belligerents and the manufacturer. The latter sells his arms or stores to the one belligerent in the ordinary course of trade; the other belligerent must guard his own interests by taking steps to intercept the consignment on its way. If a neutral Power were held responsible for all the commercial transactions of its subjects with belligerents, most of the nations of the world would have to re-write their constitutions whenever a war began. The outbreak of hostilities between any two States would have the effect of establishing in every country not participating in the war a system of governmental interference with private persons and their business transactions which would have only to be tried once to stand condemned as intolerable and impossible.

Clearly to grasp in one’s mind the fundamental distinction between the acts of a neutral State and the acts of a neutral individual is to reach the kernel of the war law of neutrality. The distinction has not always been remembered, in theory or practice. Dr. Lawrence quotes a passage from General Halleck’s *International Law*, in which that writer has written himself into a particularly ghastly mess by failing to make the distinction I have referred to.² And Mr. Hall shows that the English Foreign Office made the same elementary mistake at the beginning of last century in a certain dispute with the Danish Government.³ Indeed the confusion between State action and private action has been at the bottom of most of the difficulties which have arisen between belligerents and neutrals. Gradually the science of International Law is freeing itself of the clouds of doubt and perplexity into which it has been

The distinction between State action and individual action is a very important one.

¹ Creasy, *First Platform of International Law*, p. 593.

² Lawrence, *International Law*, p. 498.

³ Hall, *International Law*, p. 85.

The
Alabama
case
briefly re-
viewed.

suffered to drift or actually driven by over-zealous statesmen and patriotic writers. But they still hang around it in certain domains and not least in the sphere of the theory and practice of the law of neutrality. With one great department of the subject in which the air is still very far from clear I am not concerned here. It is the law respecting the building and fitting out of ships adaptable to warlike purposes for a belligerent by the citizens of a neutral State. I shall glance at the question briefly because the *cause célèbre* on the subject—the famous *Alabama* case—is one which most persons have heard of, and it may be thought that the principles applied in deciding that case are inconsistent with those I have laid down. The *Alabama* was launched at Liverpool in 1862; she received her guns and ammunition in the Azores, from two ships which left England separately, and there she hoisted the Confederate Colours and took on board her famous commander, Captain Semmes. For nearly two years she sailed the seas, capturing and destroying Federal warships. In June, 1864, she was engaged and sunk in the English Channel by the United States frigate *Kearsage*. In two years she had practically swept American commerce from the seas and transferred the Atlantic carrying trade from Yankee to English bottoms. For allowing her to leave Laird's shipbuilding yard the English Government was condemned by the Arbitration Tribunal of Geneva to pay the United States over fifteen million dollars. Now this ship was built and supplied by a private firm, and it is difficult to see how the case could be distinguished from those non-Governmental trade transactions which, as I have said, do not involve a State's neutrality. The niceties of the question I need not deal with here. If the award of the Geneva Tribunal was a sound one, then one must reconcile it with the ordinary law of neutrality on the principle indicated in the following extract from Geffcken:—

Difference
between
ships of
war and
ordinary
muni-
tions.

A ship of war is a finished machine, which may open hostilities the moment it leaves the neutral port; the neutral territory has therefore served as a base for hostile operations. To furnish a consignment of arms is quite a different thing; if they are to be of any use to the belligerent, they must first reach his territory.¹

¹ Quoted Bonfils, *op. cit.* sec. 1473. As to the *Alabama*, see Hall, *International Law*, pp. 610 ff., and all the text-books of *International Law*.

Another case in which it has been held by a school of statesmen and jurists that a neutral State is responsible for the acts of its nationals has now been decided, against the view of the school referred to, by Article VII of the Neutrality Convention. This is the case of the sale of munitions of war on a large scale by neutral individuals to the agents of a belligerent. The representatives of the United States contended before the Geneva Tribunal that "a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies." "In other words," says Hall, "it was argued that the character of contraband trade alters with the scale upon which it is carried on."¹ The same position was taken up by Count Bernstorff, the North German Ambassador in London, in 1870, on the question of the supply of arms and munitions to the French by English commercial houses. Bluntschli holds that the English failed, in this case, to "respect the prohibition formulated by International Law of coming to the aid of the belligerents"; for "a neutral State is bound to do its best to prevent, within its territory, the furnishing of munitions on a large scale, when it results from the circumstances that these supplies constitute a subsidy of war."² The same view is advanced by the Italian jurist, Calvo, and by the German General Staff jurist. The latter says:—

The question of the supply of munitions on a grand scale by a neutral State's nationals.

The delivery of contraband of war in small quantities to one of the belligerents by the nationals of a neutral State is not considered a violation of neutrality, if it preserves the character of a private and pacific transaction and does not take on that of a subsidy specially given for the war. . . . It is different with the delivery of warlike material on a large scale; there is no doubt that here one of the parties has a real ground for complaint and that it is a case of warlike assistance being rendered by neutrals.³

The view here expressed has been rejected, for land war, by the Hague representatives, who have approved the general principle that a neutral Power has no concern with the trade transactions of its nationals and residents.

¹ Hall, *International Law*, p. 84.

² Bluntschli, *op. cit.* sec. 766. Geffcken (quoted Bonfils, *op. cit.* sec. 1474) differs from his countryman and holds that the Prussian Government's contention was not supported by the existing rules of International Law.

³ *Kriegsbrauch im Landkriege*, pp. 71-2.

It is impossible to control the private supply of warlike stores.

Indeed, in practice, it is absolutely impracticable to control the sale of munitions of war when the market conditions are good, that is, when the demand exceeds the supply. Neither patriotism, nor bureaucratic vigilance, nor national sympathy with the other belligerent's cause, is sufficient to prevent men who have arms to sell selling them to a belligerent who will pay well for them. The Zulus who fought at Isandlwana and Rorke's Drift in 1879 were armed with rifles which had been smuggled into Zululand by English traders who knew perfectly well what purpose the arms were to be used for. President Grant forbade the State arsenals to sell arms to the belligerents in 1870-1; the order was circumvented by merchants buying arms from the arsenals and then shipping them to France or Germany.¹ The export of arms from the United States to France was carried on quite openly and on an enormous scale, and the impossibility of effectually checking the trade was indeed admitted by the German authorities themselves, who instructed the North German Consul at New York not to interfere with it.² The sword-bayonets for the French *chassepôts* used in the Franco-German War, though sold at Birmingham, are said to have been first imported from Germany, which thus helped to arm her foe.³ Belgium sympathised strongly with the Allies in 1854-5, yet the Russians were largely armed with Liège rifles, transmitted through Prussia—another country whose sympathies were (officially at least) on the side of England, France, and Sardinia.⁴ Germany and Austria were strongly "pro-Boer" in 1899-1902; that did not prevent England obtaining from Germany the quick-firing guns which she needed so badly, and from Austria the big howitzers which it was thought would be required for the siege of Pretoria.⁵ The English agents made their purchases quietly and without advertising their purpose, for the state of popular feeling on the Continent at the time would have condemned, for senti-

¹ Bonfils, *op. cit.* sec. 1474.

² Hozier, *Franco-Prussian War*, Vol. II, p. 179.

³ Cassell's *History*, Vol. I, p. 548.

⁴ Nolan, *War against Russia*, Vol. I, p. 671.

⁵ Wyman's *Army Debates*, Session 1902, Vol. II, p. 949; *Times History*, Vol. IV, p. 17.

mental reasons, transactions which were quite irreproachable so far as their effect on German or Austrian neutrality went.

The freedom of export which was allowed to the firms of Creusot in France (who practically armed the Boers) and of Skoda in Austria was restricted in the case of the German firm of Krupp Brothers, which has a semi-official character and which was forbidden by the Government to supply munitions to either belligerent.¹ It is always of course within a neutral Government's sovereign powers to forbid its subjects to export or carry *matériel* for a belligerent. In 1870 Switzerland, Belgium, and Japan forbade their nationals to sell or transport arms destined for a belligerent.² But—apart from the question whether a prohibition is anything more than a formality, having no practical effect—no such prohibition is required by the law of neutrality. It is an instance of municipal law imposing a greater obligation than International Law. England and the United States in the same war merely called the attention of their subjects to the risk they ran of having their merchandise seized as contraband of war. These nations acted upon the principle laid down by President Pierce in 1855, that, although the neutral citizen who sells to or carries for a belligerent “exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality nor of themselves implicate the Government.”³

In illustrating the difference between the acts of a neutral State and the acts of neutral individuals, I have wandered a little from the order of my subject. I now return to Article I of the Convention, which “consecrates the first and fundamental effect of neutrality during war.”⁴ A very practical question at once arises out of this Article: what remedy has a belligerent if the neutral territory is violated by the enemy and if the neutral State, being weak, is unable to prevent the continuance of the violation? The practical answer to the question has been that the aggrieved belligerent is then freed from respecting the “neutral” State's neutrality. When the German columns

A neutral State sometimes takes precautions which are not strictly required by International Law.

The violation of neutral territory.

¹ See paper by M. Desjardins in *Revue des Deux Mondes*, 1st March, 1900, p. 69.

² Bluntschli, *op. cit.* sec. 766.

³ Hall, *International Law*, p. 84.

⁴ Hague II B.B. (A), p. 125.

If the neutral State does not take steps to assert its right of inviolability, the aggrieved belligerent is entitled to act for himself.

were closing on MacMahon at the end of August, 1870, before the great struggle at Sedan, it was feared by Moltke that the French troops would escape by taking refuge in Belgium and that that country might be unwilling or unable to disarm them. He therefore issued an Army Order to the IIIrd and Meuse armies in which he said:—"Should the enemy pass over into Belgium without being at once disarmed, he is to be pursued thither without delay."¹ And Bismarck informed an English correspondent at the same time that Germany's respect for the neutrality of Belgium was contingent on its being respected also by France.² During the Anglo-Boer War, the native territories—like Swaziland and Basutoland—were, in accordance with an understanding between the belligerents, treated as neutral ground; but when a Boer commando retreated into Swaziland in March, 1901, a British column followed and attacked it there.³ Later in the same war, when the British forces occupied Komati Poort on the Transvaal-Mozambique border, the Boer leaders Coetsee and Pienaar showed a disposition to hug the Portuguese frontiers and to endanger Portuguese neutrality thereby. The authorities at Lourenço Marquez set up flags along the border, to prevent any mistake as to the exact boundary, and brought up all the troops in the province to protect its inviolability. But it was feared that these measures would not suffice to prevent the Boers violating Portugal's neutrality, and the Boers were therefore warned that unless they moved away six miles from the boundary, Lord Roberts would be permitted to land troops at Delagoa Bay. The warning was effectual; the Boers moved away, and if they subsequently crossed the border, it was only for the legitimate purpose of asking to be disarmed.⁴ Japan went still further in the same direction in 1904; she deliberately violated Korea's neutrality to prevent its being violated by the Russians. She based her action on the weakness of Korea: "Had Korea been strong," said Major-General Iditti in his official despatch, "neither Japan nor Russia would have dared to violate her

Doubtful action of Japan in 1904.

¹ German Official *History*, Part I, Vol. II, Appendix 42.

² Cassell's *History*, Vol. I, p. 87.

³ *Times History*, Vol. V, p. 177.

Times History, Vol. IV, p. 482.

frontier." A Japanese force was landed at Chemulpo because it was *suspected* that the Russians would land there if the Japanese did not, and that the Korean authorities would be unable to make good their country's obligations as a neutral Power, with the result that Russia would gain a great military advantage.¹ It must be admitted that Japan's action was an extremely dubious one; to anticipate a suspected act of violation by the enemy is to open the way for a general and systematic disregard of the principles of International Law. One may say, with Dr. Lawrence, that Korea "never has been, and never was meant to be, fully independent in the sense given by International jurists," and that "a territory cannot be neutral when war is being waged in it and for it";² but Japan herself was influenced by no such considerations as these when she acted as she did. She simply forestalled, and admitted that she forestalled, a wrongful act of Russia. The case of Manchuria was on a different footing from that of Korea. Nominally, China was neutral; actually, her territory had been occupied by one of the belligerents—Russia—before the commencement of the war.³ It was specially agreed between China and Japan in February, 1904, that the latter should respect China's sovereignty so long as Russia did the same, "except in the regions occupied by Russia." The provinces not held by the Russian troops were to be regarded as neutral. China protected the neutrality thus recognised by mobilising her forces on the threatened frontiers, and on several occasions her troops repelled the Russians when they endeavoured to pass into the neutralised regions. "Herein," says Professor Ariga, "lay the great difference between the legal situation of China and Korea."⁴

The instances which I have given above bear out, I think, the view of Professor Ariga that in many cases "a violation of neutrality may, in land war, have so very great an influence on

¹ Ariga, *op. cit.* pp. 51-3.

² *War and Neutrality in the Far East*, pp. 278, 281. See also F. E. Smith and N. W. Sibley's *International Law as interpreted during the Russo-Japanese War*, pp. 21-4.

³ Russia had been in partial occupation of Manchuria since the railway concession was obtained in 1897. (Cowen, *Russo-Japanese War*, p. 267.)

⁴ Ariga, *op. cit.* pp. 61-4.

Respect for a neutral frontier is contingent upon the neutral State enforcing its rights as such.

the general issue of the operations that the other belligerent will usually not have the time to resort to the always uncertain methods of diplomacy; he must therefore retort in kind and at once to the act of violation, whatever be the intention of the neutral nation."¹ A neutral State which has the power and the intention to make its neutrality respected may safely be left to deal with any case of violation; it is a waste of energy for a belligerent to take upon himself a duty which Convention throws upon a neutral. But where the neutral cannot or will not enforce its rights, then the belligerent is fully entitled to prevent the violation permitted by the neutral redounding to his disadvantage. "If the neutral is too feeble," says M. Bonfils, "to safeguard his neutrality, to resist the belligerent, he will naturally be compelled to endure the measures adopted by the other belligerent, and the struggle will in fact continue on the neutral territory, violated by the two combatants."²

The question of the right of belligerent passage and neutral duties.

Article II forbids a belligerent to move troops or convoy across a neutral's territory, and Article V binds the neutral to prevent his doing so. The question of the right of passage has been much discussed in modern times. Three separate views have been advanced by writers and politicians.

1. A neutral may properly grant a belligerent passage if he is prepared to grant the other belligerent the same privilege.³

2. He may not allow passage unless expressly bound to do so under a servitude imposed upon him in favour of the belligerent, or a convention concluded with the latter, before the war could be foreseen.⁴

3. He must not allow passage under any conditions.⁵

The grant of passage under an old servitude or treaty.

The first view is now generally discredited. Hall inclines to agree with the second; he would allow a right of passage if such existed in time of peace to enable a State to reach an outlying portion of its territory and if not greatly more than the usual number of troops habitually availing themselves of the right under peace conditions were permitted to pass in war. "If the former use has been habitual," he says, "and especially if it has been secured by treaty, it probably could not be fairly

¹ Ariga, *op. cit.* p. 506.

² Bonfils, *op. cit.* sec. 1450.

³ Travers Twiss, *International Law*, Vol. II, sec. 218.

⁴ Bluntschli, *op. cit.* sec. 771.

⁵ Creasy, *op. cit.* p. 589.

held that the neutral State is guilty of un-neutral conduct in allowing the passage of troops in war.”¹ Mr. F. E. Smith puts the case for the third view mentioned above, and against the second, in a graphic way. “As between one belligerent A and a neutral C, it is either illegal for C to give B, the other belligerent, a right of passage, or it is not. If it is not, *cadit questio*; if it is, how can C defend himself to A by the plea that he was under contract to perform an illegal act?”²

Practice has been as undecided as theory. In 1870 the Swiss Republic refused to let bodies of Alsatian recruits cross her territory from Bâle to southern France; they were ununiformed and unarmed, but, as Bluntschli points out, they had been organised in Switzerland, and it was not a question of the passage of individual travellers but of transporting soldiers.³ In the same war, Belgium refused passage even to the German convoys of evacuation; with this case I shall deal later under Article XIV. In 1859 Bavaria, however, allowed passage to Austrian troops and their convoys of French prisoners of war.⁴ Just before the outbreak of the war of 1877, Roumania—nominally subject to Turkey, really an independent neutral Power—became a party to a convention by which Russian troops were allowed to pass through Roumanian territory for the purpose of invading Turkey.⁵ The international situation of Roumania was, however, almost as anomalous as that of Korea in 1904. A better precedent in support of the second view I have mentioned is the Portuguese Government’s grant of military passage to an English expeditionary force in the South African War. An Anglo-Portuguese Treaty of 1891 gave Great Britain the right to send persons and goods over the line from Beira, in Portuguese East Africa, to Umtali in Rhodesia. The Portuguese Cabinet declined for some months to regard the terms of the Treaty as continuing to have binding force under the changed conditions which had arisen. It was not until March, 1900, that permission was given to the English Government to make use of the Beira-Umtali line. The Transvaal

Practice
in modern
wars.

The Beira
question
in 1900.

¹ Hall, *International Law*, pp. 602-3.

² F. E. Smith, *International Law* (Temple Primers), p. 144.

³ Bluntschli, *op. cit.* sec. 770, note.

⁴ *Ibid.* sec. 785, note; Pillet, *op. cit.* p. 285.

⁵ Lawrence, *International Law*, p. 527.

Government was notified of the decision of Portugal in a despatch which ended as follows :

The Portuguese Government cannot refuse this demand and must fulfil a convention depending on reciprocity, a convention which was settled long before the present state of war had been foreseen. This agreement cannot be regarded as a superfluous support of one of the belligerent parties or as a violation of the duties imposed by neutrality or indeed of the good friendly relations which the Portuguese Government always wishes to keep up with the Government of the South African Republic.

The Transvaal Government at once replied in the sense of the following :

The Treaty of 1891 had not been made public and no notice of it was received by the Transvaal at the outbreak of the war. It could not therefore be applied in this case, and in any case as war had begun such a Treaty could not be applied by a neutral State to the disadvantage of third parties. The fact of neutrality had suspended the working of the agreement. The action of Portugal would put her in the position of an enemy instead of a neutral ally (*sic*), wherefore the Transvaal protested strongly against the measure.¹

Portugal declined to recede from her position, and an English force under General Carrington was allowed to land at Beira and to cross the neutral territory to join General Plumer's Rhodesian force.² It cannot be denied that even apart from the doubtfulness as to the general legality of the grant of passage in such cases the propriety of Portugal's action is very dubious. The question has been most carefully examined by Dr. Baty, who belongs to the school which would allow a right of passage in war time if it were claimed in virtue of a servitude imposed on the neutral Power ; that is, " if the Power claiming the right of way, or other servitude, could enforce its claims during peace without infringing the sovereignty of the territorial Power." He holds that the right of passage secured by the Treaty of 1891 was a right of commercial passage—for traders and merchandise ; and that the Treaty has to be strained out of its true interpretation to cover the transport of troops and munitions.³ In the case of the line Delagoa Bay-Komati

¹ *Times History*, Vol. IV, pp. 364-6. ² Despagnet, *op. cit.* p. 248.

³ T. Baty, *International Law in South Africa*, pp. 74-7.

Poort, no similar claim was advanced by Great Britain. The right of military passage over this territory was secured by a Treaty of 1879, which, however, had never been ratified by the Portuguese Government.¹ No doubt in this case also the right of passage would have been conceded by Portugal if the Treaty had been confirmed, seeing that it specifically provided for the transit of troops and did not require to be stretched, as the Treaty of 1891 did, to cover such a service. As I shall show later on, Portugal's attitude to Great Britain in this war was distinctly one of "benevolent neutrality," and her procedure generally was hardly conformable with the strict canon of the law of neutrality. Her action in regard to the Beira matter would certainly be condemned by the Neutrality Convention of 1907. Articles II and V are quite absolute and unconditioned; they categorically forbid the sending of troops through a neutral territory. It is no defence under these Articles to say that an ancient servitude or Treaty provides for the right of passage. A nation has no right to bind itself by granting a servitude or signing a Treaty to break the law. The refusal of passage ought to serve the cause of peace. "The abolition of the right of passage," says Professor Pillet, "and also of the power to grant it is calculated to diminish wars by making contact between adversaries more difficult. Between two particular States, which are neither maritime nor adjoining, a separate war is a physical impossibility."²

Passage could not now be allowed even under a former agreement.

There is no inconsistency between the provisions of Articles II and VII as to the transmission of munitions and supplies over a neutral territory. The two Articles may conveniently be considered together. The first refers to army munitions and supplies transmitted, say, from a Government storehouse to an army in the field across an intervening neutral territory. The second refers to purely commercial enterprises undertaken by the inhabitants of a neutral country. Thus a belligerent Government may send its agents to purchase stores and supplies in a neutral country, and these stores and supplies may become the belligerent's property at the time of purchase; but the neutral State is not bound to prevent their being exported from or carried through its dominions. Such stores and

Distinction between convoy and commercial transport.

¹ Despagne, *op. cit.*, p. 196.

² Pillet, *op. cit.*, p. 285, *note*.

Exemplified by an incident of the Red River Expedition.

supplies have not had an official character stamped upon them, as it were, by their being delivered into the belligerent's warehouses, and they are not given the belligerent's official protection by being convoyed by a detachment of his troops. The kind of transmission which Article II forbids may be illustrated by an incident of Lord Wolseley's Red River Expedition against Louis Riel and his Canadian half-breeds. The Government of the United States has always been a stout champion of the right of neutral individuals to supply a belligerent, or carry for him, without involving their State's neutrality. Ordinary commercial carriage has never been interdicted in America; "the laws of the United States," said President Pierce in 1855, "do not forbid their citizens to sell to either of the belligerent Powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation."¹ Yet, when General Wolseley proposed to send a ship with munitions of war through the Sault Ste. Marie Canal—which belongs to the United States—the Washington Government refused to give the necessary permission.² Although the case was strictly not one coming under the ordinary laws affecting neutrality, for the "other belligerent" was a revolted British subject, not an independent Power, the fact that it was a question not of the ordinary commercial carriage of munitions but of the transmission of a convoy—of an integral element of an invading military force—was regarded by the United States as a ground for refusing the right of passage. If the commander of an expeditionary force separates his munitions and supplies from his troops and despatches the former by a shorter or less troublesome route, intending to re-unite the two constituents of his fighting machine at some more convenient point, the munitions and supplies are still part and parcel of a military expedition, and a neutral State must not allow them to cross its frontiers. In the Russo-Japanese War the Chinese Government did not forbid the performance of ordinary carrying services for the belligerents by Chinese nationals. The railway from Sin-Min-Ting (West of the Liao and therefore in the neutralised part of China) to Keou-Pan-Tse was used to carry

The practice in the Russo-Japanese War.

¹ Hall, *International Law*, p. 84.

² Lord Wolseley, *Story of a Soldier's Life*, Vol. II, pp. 185-6.

provisions for the Russians at Mukden without any interference from the Chinese authorities; and the same line was subsequently made use of by the Japanese themselves when Mukden was occupied.

Since May 1905 (says Professor Ariga) we have sent our supplies by the Keou-Pan-Tse—Sin-Min-Ting railway as merchandise forwarded from the English firm of Bush and Co., of Ying-Keou and addressed to the Japanese firm of Mitsui & Co., at Sing-Min-Ting. This last firm was to sell them to Fugita & Co., contractors to our army. We had no right to control or supervise the neutral railway.¹

Japan drew freely upon China for her supplies and when the Russian Government complained of this, the Tokio Foreign Office sent the following reply (January 1905):—

Russia accuses Japan of importing from Che-Fu and other Chinese ports great quantities of contraband of war. The Imperial (Japanese) Government admits that the armies in the field have bought provisions at Che-Fu and elsewhere in China through the medium of merchants, and it does not deny that these provisions are considered contraband of war according to their destination. The Imperial Government refuses nevertheless to consider this act as a violation of neutrality on the part either of Japan or of China, since International Law does not forbid commerce in contraband of war. Provisions are, moreover, contraband only in this sense, that the enemy has the right to seize them upon the sea, and the fact that Russia is no longer in a position to make use of this right does not give an illegal character to the act of transporting them. Russia herself has never considered commerce in contraband a breach of neutrality so long as Port Arthur was in her possession and she could benefit from such commerce; in fact, during the siege she drew a great part of her supplies from China.²

The reply I have quoted is a sound statement of the International Law of the case; yet it seems to me that the actions of the Japanese were not always quite consistent with the views advanced therein. While Port Arthur held out a good many attempts were made to smuggle ammunition into it, and some very clever expedients were resorted to by the Russian Agents to effect that end. In December, 1904, a total of over three and a half million cartridges were discovered by the Chinese railway authorities concealed in sacks of wool

¹ Ariga, *op. cit.* pp. 538-41.

² *Ibid.* p. 517.

The confiscation by China of ammunition destined for Port Arthur.

consigned from Kalgan to Fengtai. The sacks were so weighty for their bulk that the Chinese functionaries, suspecting something, asked what the reason was, and being told that the wool was compressed and knowing that there was no machinery for compressing wool in Manchuria, proceeded to open the sacks and found therein the hidden ammunition. Now there is a convention between China and Russia relating to commerce by land, which gives China the right to confiscate property which is found not to correspond with the invoice therefor; and this convention was sufficient authority for the action which the Chinese Government took of confiscating the ammunition. But the Japanese *Chargé d'Affaires* at Peking advanced as an argument for the confiscation that the Russian action was a violation of International Law as well as of the special convention; and the Japanese Foreign Minister reported the case to the neutral Powers as an infraction by Russia of China's neutrality. "The transport," says the Tokio *communiqué*, "was considered illegal; the destination of the goods, their being concealed, and their quantity showed that they were destined for the war."¹ The three characteristics of the transport which are referred to here do not appear to me to warrant the confiscation, under the laws of neutrality. It is no breach of neutrality for a neutral State to suffer its subjects to undertake the carriage, in the ordinary course of trade, of munitions of any quantity destined eventually for a besieged town, and the fact that it is packed in such a way as to facilitate the passage of the consignment over the space of country or water where it is liable to be stopped by the enemy does not appear to throw any obligations on the neutral State to interfere with the carriage. If the transaction is a commercial one—and in the case in question the ammunition was despatched by the Kalgan agent of the firm of Delge and Schroeder to a Russian merchant, Petchatnoff, at Fengtai²—it is one which does not concern the neutral State. There does not appear to have been anything in the nature of a "convoy" in the case, as there was in another case recorded by Professor Ariga, in which the Russians sent a consignment of ammunition, loaded on camels, from Siberia across Mongolia, for the troops in North Manchuria. The

Doubtful if the confiscation was warranted under the laws of neutrality.

¹ Ariga, *op. cit.* pp. 519, 527-9.

² *Ibid.* p. 528.

ammunition was escorted by Russian soldiers in disguise, and was properly confiscated by China as being a real military convoy.¹ The truth is that the law relating to neutrality has been pulled this way and that by almost every nation according to the dictates of its momentary interests. The Delagoa-Bay question which arose in the Anglo-Boer war is very instructive in this connection. Whenever Great Britain has played the part of a neutral, her official view has been strongly against holding neutral States responsible for their residents' acts of commerce. One may see this view stated quite specifically in the Granville-Bernstorff controversy of 1870, and it is reflected in the writings of the English jurists generally. Nor has any distinction been made by English ministers or writers between the transport and export of munitions, such as was made by Prussia in 1854-5, when she forbade the carriage of arms across her territory but not the exportation of arms manufactured in Prussian workshops.² In 1899-1901, however, the English Government took up the position that Portugal was bound to prevent the transit of "contraband" consigned from Lourenço Marquez (Delagoa Bay) to the Transvaal. Lourenço Marquez was at first a veritable base of supply for the Boers. The port was more useful to them than if it were a Transvaal possession, for, being neutral, it could not be blockaded by the British cruisers. The British Press—obeying, Professor Despagnet remarks with unconscious humour, a word of command from the Government—instituted a campaign of intimidation against Portugal, and threatened that country with a British occupation of the Bay if her neutral obligations were not more scrupulously fulfilled. After a good deal of discussion, Portugal consented to sequester all supplies of arms, ammunition, and warlike stores generally, as well as clothing and preserved meat, consigned to the Transvaal.³ The fact that the stores passed over the Government railway and through the Government customs-house may have been regarded as rendering the Portuguese Government officially cognisant of and responsible for what would otherwise have been purely commercial

The Delagoa Bay question in 1899-1902.

Portugal's action of doubtful conformity with the laws of neutrality.

¹ Ariga, *op. cit.* p. 526.

² Bonfils, *op. cit.* sec. 1474.

³ Despagnet, *op. cit.* pp. 194-6, 202; *Times History*, Vol. III, p. 103, Vol. IV, pp. 381-2.

The
present
position.

acts. It may also have been thought that the fact of Delagoa Bay being the sole base of supply of the Boers affected the law of the question. Whatever be the explanation of Britain's claim and Portugal's acquiescence, it is evident that Article VII of the Neutrality Convention would now be ample warranty for a refusal by the latter Government—should such a case arise again—to interfere with the transit of munitions. To prevent warlike stores and supplies reaching the Boers it would now be necessary to rely on the watchfulness of the British troops on the inland border of Mozambique, and not on the friendly offices of the Portuguese officials. When the discussion was being carried on in the Press in 1900, the *Standard* and other journals appealed to the ancient ties of friendship between Portugal and England as a reason for compliance with the latter's demands.¹ One cannot help thinking that the British Government also relied upon this political, non-legal, consideration in her claim, and that the attitude of Portugal was one of "benevolent neutrality," which is not really a neutral attitude at all.

The use of
neutral
tele-
graphs,
etc.

Articles III and VIII are naturally taken together. The first paragraph of Article III forbids, for the future, any such action as that of Russia in installing a radiographic apparatus in her consulate at Chefoo for the purpose of communicating with Port Arthur during the siege in 1904.² "There is no contradiction," says the report of the Hague Committee, "between this Article and Article VIII. The first contemplates the installation of a station or an apparatus by the belligerent parties on the territory of the neutral State, or the use of a station or apparatus installed by them there during peace, for an exclusively military purpose and without being opened to the public. Article VIII, on the other hand, refers to an apparatus used for the public service and administered either by the neutral State or by a Company or individuals."³

The words of the last part of sub-paragraph (b)—"and which has not been opened for the service of public messages"—are borrowed from the Radio-Telegraphic Convention of 1906. They must be read, as must Article VIII, subject to the follow-

¹ Despagnet, *l.c.*

² Ariga, *op. cit.* p. 519.

³ Hague II B.B. (A), p. 125.

ing commentary which was proposed by Lord Reay, in the name of the British delegation, adopted unanimously by the Committee and recorded in the Protocol :

The liberty of a neutral State to transmit messages by means of wire telegraphs, submarine cables or radiographic apparatus, does not imply the faculty to use these means or to permit their use, for the purpose of lending a manifest assistance to one of the belligerents.¹

Articles III (b) and VIII are to be read subject to the "gloss" in the Committee's Report.

Another two Articles which run in pairs are Articles IV and VI. By putting in a "but" before Article VI one is enabled to see their intimate connection and interdependence. The *locus classicus* as regards the law affecting recruiting in a neutral country is the well-known case of the English Ambassador at Washington in 1854, whose recall was demanded by the United States on the ground that he encouraged and aided the enlistment of British subjects resident in the States for service in the Crimea.² At one time it was thought no breach of neutrality for a Government itself to furnish troops to a belligerent. In the 17th century whole regiments were lent or hired to belligerents by "neutral" sovereigns. Sometimes the right to levy recruits in the territory of another State which might be a neutral in the struggle which gave occasion for the exercising of the right—was secured by treaty. A treaty of 1656 between England and Sweden provided that it should be "lawful for either of the contracting parties to raise soldiers by beat of drum within the kingdoms, countries, and cities of the other, and to hire men of war and ships of burden."³ During the 18th century the Swiss Republic was bound by treaties, or "capitulations" as they were called, to provide other nations, especially France, with a certain number of companies or regiments.⁴ England had agreements with Hesse-Cassel and other German States, under which she could demand the services of Hessian or other mercenaries in war, paying them and using them just like her own troops. The British commanders had with them large bodies of troops drawn from neutral German

The enrolling of neutral subjects in a belligerent's forces.

Once upon a time neutral States furnished troops to belligerents.

¹ Hague II B.B. (A), p. 128.

² Woolsey, *International Law*, pp. 298-9.

³ Hall, *International Law*, p. 580.

⁴ Pillet, *op. cit.* p. 287.

Last
instance
of this
practice.

A neutral
must not
let bodies
of troops
be organ-
ised for a
belliger-
ent on its
soil.

States in the Seven Years' War and the American Revolutionary War.¹ Indeed, it was not until 1788 that the right of a neutral State to lend or hire its troops to a belligerent was questioned by statesmen. In that year Sweden protested against the action of Denmark, a neutral State, in furnishing, under treaty, a body of troops to Russia, with whom Sweden was at war.² This is the last occasion on which the old practice appears to have been followed. The changed conception of neutrality has now not only made the peddling of troops an unneutral act if carried out by the State, but has led the Powers to forbid their nationals, either by Foreign Enlistment Acts or by declarations of neutrality issued on any outbreak of hostilities, to enroll themselves in the service of a belligerent. Such enactments and declarations usually go beyond the strict limit of the requirements of International Law: that is, the obligations they impose—obligations under municipal law, as affecting the citizen's relation to his own State—are greater than the obligations imposed on the State by International Law. For Article VI shows that a neutral State cannot be accused of failing in its duty because it allows individuals to leave its territories to join a belligerent: whereas their doing so may be an offence against their own Government. What Articles IV and VI aim at preventing is the issuing of organised bodies—bodies which only need to be armed to become an immediate fighting force—from the shelter of a neutral territory. A neutral State must not allow a belligerent to create or perfect his fighting machine within its borders. One kind of organised contingent is, under a modern usage, allowed to leave a neutral State freely for service in a belligerent army. I refer to the nationals of a belligerent State who are recalled to serve in their country's army. "Their obligation has not been formed within the neutral territory which they leave. . . . Their consuls assist without offence in making the necessary arrangements for their return."³ In the chapter on the Commencement of Hostilities I have shown that even belligerent States place no obstacle to the exit of the enemy's nationals who are recalled to their country's standards

¹ Hall, *International Law*, p. 587.

² *Ibid.* pp. 587-8.

³ Westlake, *International Law*, Part II, p. 181. See Bonfils, *op. cit.* sec. 1459.

upon the outbreak of war. Still less is their going prevented by neutral States. The United States Government declined to interfere with the return of Frenchmen, resident in the States, for service in the Franco-German War. Nearly 1,200 of these recalled soldiers embarked in two French ships at New York which also carried 96,000 rifles and 11,000,000 cartridges. The authorities held that, as the men were not officered or in any way organised, and as the arms and ammunition were legitimate subjects of commerce, the issuing of the ships from an American port did not constitute an "expedition."¹ In the same war Switzerland allowed large numbers of French conscripts to pass over her railways on their way back to France from such outlying provinces as Savoy: they had not been organised in Switzerland, like the recruits raised at Bâle, who, as I mentioned under Article II, were not allowed passage.² In every war subjects of neutral Powers serve in the ranks of the belligerents without their State's neutrality being held to be compromised thereby. When Servia and Turkey went to war in 1876 thousands of Russian volunteers passed across the Russian frontiers to lend their swords to Servia. Dr. Lawrence holds that the Russian Government, in making no effort to restrain them, was "undoubtedly guilty of a breach of neutrality towards Turkey."³ Of this I am very doubtful. I can see no difference—and I think the Neutrality Convention makes none—between a neutral Government's responsibility on this head and its responsibility for commercial acts. The view that a neutral State, while not responsible for ordinary commercial transactions, must not allow a belligerent to be supplied from its territory on a grand scale, has underlying it the same broad principle as the view that a State must prevent its subjects or residents issuing from it on a large scale to take service in a belligerent's army. There is a good deal to be said for both these views, but both have the balance of practical utility against them. The first (as to stores, etc.) is expressly abandoned by Article VII of the Convention, and that the framers of the Convention intended likewise to negative the parallel view, as to men (the view ad-

Large numbers of Russians in Servian service in 1876.

Was Russia unneutral?

¹ Hall, *International Law*, p. 609.

² Bluntschli, *op. cit.* sec. 770, note.

³ Lawrence, *International Law*, p. 533.

vanced by Dr. Lawrence), is, I think, evident from the following extract from the Committee's report :

It goes without saying that the neutral State must prevent its frontiers being crossed by corps or bands which have been organised on its territory without its knowledge. On the other hand, individuals may be considered as acting in an isolated manner when there exists between them no bond of a known or obvious organisation, *even when a number of them pass the frontier simultaneously*.¹

It must, however, be admitted that the view of Dr. Lawrence has been sometimes that followed in practice. The Italian Government adopted stringent precautions in 1897 to prevent its subjects leaving Italian ports in large bodies for service with the Greeks. The Italian Volunteers embarked, therefore, separately and in small groups, when no official obstacle was raised to their going.² A Government would, I think, be under no *international* obligation to take such steps to-day as Italy took in 1897.

Neutrals
serving
with the
Boers in
1899-1902.

The number of foreigners—*i.e.*, neutrals—who fought for the Boers in the war of 1899-1902 is given on good authority as 2,500.³ Few neutral subjects served on the other side. General Ricciotti Garibaldi (son of the Italian liberator and himself a veteran of the wars of 1870-1 and 1897, when he fought for France and Greece) offered his services and those of a contingent of Italian Volunteers to the English authorities, who did not, however, take advantage of the offer.⁴ On the Boer side there was an Italian legion commanded by a picturesque free-lance called Captain Richiardi, who had been commander of the foreign legion under Aguinaldo in the Philippines, but left Aguinaldo to join the Boers on the outbreak of war in South Africa.⁵ Another interesting figure among the foreign volunteers was Colonel de Villebois-Marcuil, an ex-officer of the French

¹ Hague II. B.B. (A), p. 127. The word "separately" (*isolément*) in Article VII appears to express the absence of the cohesion of the disciplined military unit.

² *R. D. I.* September-October, 1897, p. 721.

³ *Times History*, Vol. II, p. 86. Howard C. Hillegas (*With the Boer Forces*) gives the total as 8,675; subtracting from this number the Afrikaners (6,000) and the Irish (200), one gets about the same number as that given in the *Times History*.

⁴ *Ibid.* Vol. III, p. 56.

⁵ H. C. Hillegas, *op. cit.* p. 272.

army and a military writer of repute. This gallant free-lance was killed in the engagement at Tweefontein in April, 1900; he was buried, by Lord Methuen's orders, with full military honours, the Loyal North Lancashire Regiment firing the last volley over his grave. The French prisoners captured in the engagement pronounced the attitude of the English towards their dead chief to have been "*d'une correction parfaite.*"¹ De Villebois-Mareuil was, as I have said, a retired officer, and his joining the Boers was a matter with which the French Government had no concern. Russia, too, was not involved in any way by the service of Colonel Gourko, who had been in the Russian army, with the Boers.² In the war of 1877-8 the Turkish Navy was commanded by Admiral Hobart Pasha, an ex-officer of the British Royal Navy.³ Retired officers, having ceased to possess an official character, as it were, are recognised as having a freedom of action which the usages affecting neutrality do not allow to serving officers. It is a distinctly unneutral act for a neutral State to give its officers permission to take service with a belligerent. Russia undoubtedly erred in granting leave to her officers to serve with the Servian forces against Turkey in 1876.⁴ She adopted a more correct attitude in the case of the Serbo-Bulgarian War of 1884, when she recalled the Russian officers serving with the Bulgarian army as instructors; and in the Anglo-Boer War when she refused leave to Prince Louis Napoleon, a colonel in the Russian army, to join the Boers.⁵ Germany is said to have consented to her officers (on the active list) who were attached to the Turkish army as instructors remaining with the Turkish forces when the war with Greece broke out in 1897 and following the campaign as combatants. If so, she certainly failed in her duties as a neutral.⁶ The case of neutral officers who join a belligerent without their Government's consent is a little doubtful. It is usual for such officers to be removed from the active list of their army when their Government becomes aware of what they have done.

A neutral State not affected by its officers on retired list serving with a belligerent.

It is different in the case of officers on the active list.

¹ Maurice, *Official History*, Vol. II, p. 333; *Times History*, Vol. IV, p. 214.

² *Revue des Deux Mondes*, 1st March, 1900, p. 71.

³ F. V. Greene, *Russian Army and its Campaigns in Turkey*, p. 156.

⁴ See Despagne, *op. cit.* p. 170.

⁵ *Ibid.* p. 170.

⁶ *R.D.I.* September-October, 1897, p. 721; Pillet, *op. cit.* p. 288, note.

Can
neutral
officers be
deprived
of the
privileges
of com-
batant
enemies ?

France goes farther and deprives such officers (or men) not only of their quality of French officers but of their quality of French citizens.¹ But whether it could be regarded as an unneutral act if the officers were suffered to continue on the active list in such circumstances is open to doubt. It seems reasonable, however, to require the neutral State to remove the names of such officers as it is actually aware have joined a belligerent's forces, and to regard a failure to do so as equivalent to an official sanction for the conduct of the officer in question, or, in other words, as an unneutral act. As to the officers themselves, they are, I think, in all cases to be regarded as ordinary enemy combatants. Professor de Martens draws a distinction between those serving with and those serving without their Government's consent. He says, referring to the British officers who helped the Turks in 1877: "So long as it was not proved, by irrefutable evidence, that these officers had received the authority of their Government and still counted as English officers, it was proper to consider them as equal to any other enemy, as subject to the laws of war and susceptible of being made prisoners."² The inevitable inference of these words is that officers serving *with* the neutral Government's consent are *not* entitled to the privileges of enemy combatants; that is, that they may be brought to trial as irregular combatants and executed. I cannot agree with this view; if the neutral State has authorised its officers to join a belligerent, then the other belligerent's remedy is international; he has been prejudiced by an act of sovereignty on the part of a neutral State, and should claim reparation from that State. It would be extremely difficult, in practice, to discover whether any given officer was or was not serving with his Government's consent. To discover this fact reference would ordinarily have to be made to the neutral State; if the latter "fathers" its officer's act, then his execution by the belligerent is even more likely to set the belligerent and the neutral by the ears than the demand for satisfaction between State and State would be likely to do.

¹ *Revue des Deux Mondes*, l.c. p. 67. Professor Despagnet (*op. cit.* p. 171) points out that there is a doubt whether the French law deprives of their nationality persons who attach themselves to a belligerent for the duration of a war without taking regular service in his army.

² De Martens, *op. cit.* p. 501.

There is only one case in which men commissioned or enlisted in a belligerent's army can be deprived of their war rights on capture (leaving out of consideration such cases as may arise under Articles I and II of the Hague *Règlement*, the case of men guilty of offences against war law, and the case of reprisals). This is the case of subjects of the one belligerent found to be serving with the other's forces. Among the "foreign" volunteers who served with the Greeks in 1897 were many Cretans: being subjects of Turkey, they were executed by the Turkish commanders when captured.¹ Colonel Lynch, the leader of the Irish Brigade who fought for the Boers in 1899-1900, was condemned to death for high treason when he fell into the hands of the British authorities.²

A proposal was made by the Japanese delegation at the last Conference that Article IV of the Convention should be expanded to forbid belligerents to make use of neutral territory for the purpose of establishing "bases of supply." The proposal was withdrawn in view of the great difficulty of enforcing any such provision. A belligerent State would always be able to obtain supplies from the neutral country through its agents or other intermediaries, and a very little manœuvring would suffice to make the prohibition a dead letter.

Article X is well illustrated by some incidents of the Russo-Japanese War. When the Russian troops under General Mistchenko entered the part of Manchuria west of the Liao, which was excluded from the theatre of war and proclaimed as neutral by the Chinese Note of February, 1904, Chinese soldiers fought side by side with the Japanese in repelling them. On other occasions, too, the Chinese forces resisted attempted violations of China's neutrality, and in no case did the Russian Government claim that their doing so was an unfriendly act on the part of China.³

¹ *R.D.I.* September-October, 1897, p. 694.

² But he was not executed; after a short term of imprisonment he was released, and is now a member of the British House of Commons.

³ Ariga, *op. cit.* pp. 521-2, 64.

Section II.—Belligerents Interned and Wounded Tended in Neutral Territory.

ARTICLE XI.

A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

ARTICLE XII.

In the absence of a special Convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity.

ARTICLE XIII.

A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

ARTICLE XIV.

A neutral Power may authorise the passage over its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

ARTICLE XV.

The Geneva Convention applies to sick and wounded interned in neutral territory.

Articles XI, XII, XIV, and XV figured, as I have said before, in the Hague *Règlement* of 1899, out of which they were removed in 1907.

Article XI speaks of a belligerent's troops being "interned" by a neutral. It is a little unfortunate that the same word is applied to prisoners of war in Article V of the *Règlement*, for the troops mentioned in Article XI of the Convention are not prisoners of war; "they are friends who have asked for asylum."¹ The relation of captor and prisoners of war cannot exist between a neutral State and the troops of a belligerent. The *locus classicus* for the practical application of the war law on the subject is the Convention made between the French General Clinchant and the Swiss General Herzog in 1871. The French troops were in a woeful state of destitution and though their passing into Switzerland meant the loss of 80,000 sabres and rifles to France, the other alternative was annihilation or surrender to General von Manteuffel, whose enveloping columns left no road of escape open to the starving, frost-bitten, demoralised Army of the East. The Convention contained the following clauses:—

Intern-
ment of a
belli-

gerent's
troops by
a neutral.

The Con-
vention
between
Generals
Clinchant
and
Herzog,
1871.

1. The French army demanding passage into Swiss territory will on arriving there lay down its arms, equipment, and munitions.

2. These arms, equipment, and munitions will be restored to France after the peace, and after the final settlement of the expenses occasioned to Switzerland by the presence of the French troops.

3. It will be the same with the artillery material and ammunition.

4. The horses, arms, and effects of the officers will be left at their disposal.

9. The Confederation reserves to itself the right to designate the places of internment of the officers and troops.²

A good many French troops were disarmed and interned in Belgium in the same war. Unlike Switzerland, Belgium claimed no indemnity in respect of their maintenance.³ As troops who seek asylum are merely subjected to such detention as will neutralise them for the remainder of the war, all the munitions, stores, and effects which they bring with them must be restored to them when peace ensues. A reasonable

Muni-
tions,
stores,
etc., of
interned
troops.

¹ Funck-Brentano and Sorel, quoted Bonfils, *op. cit.* sec. 1461.

² German Official *History*, Part II, Vol. III, App. 169.

³ Bluntschli, *op. cit.* sec. 434.

exception to this general rule is mentioned in the German Official Manual :—

The neutral State has the right to alienate material which is exposed to deterioration or which would cost too much to keep, such as a large number of horses. The proceeds of the sale will in such cases be deducted from the cost of internment of the troops.¹

Violation of a neutral frontier due to inadvertency or error.

"If a belligerent force," says Professor Holland in the British Official Manual, "even with prisoners, enters neutral territory in (proved) error, it should be allowed to leave immediately."² "When the violation of the neutral's territory has been due to ignorance of the boundary," says the German Manual, "and not to a deliberate design to violate it, the neutral State will require the damage to be made good at once and the necessary steps to be taken to prevent similar infractions in the future."³ Practice has been in conformity with the rule expressed above.⁴

Japanese proposal as to release of interned troops and the effect of a parole given in such a case.

The Japanese delegation proposed to supplement Article XI by providing that a neutral State must not release nor restore interned officers or men without the consent of the other belligerent; and that a parole given to the neutral State in such a case should, if violated, be regarded as a parole given to the belligerent. The Committee did not think it necessary to legislate for such cases, which would be very exceptional, but it "had no difficulty in recognising that the Japanese proposition is in accordance with recent precedents and contains a useful suggestion as to the line which a neutral State whose wish is to put its neutrality beyond question ought to follow."⁵

A neutral State and escaped prisoners of war.

Article XIII sanctions the principle that if a belligerent cannot guard his prisoners of war, he must not require a neutral neighbour to undertake that duty for him. The view advanced in the German Manual⁶ that escaped prisoners must be interned by a neutral State has the support of neither

¹ *Kriegsbrauch im Landkriege*, p. 70.

² *Official Laws and Customs of War*, p. 47.

³ *Kriegsbrauch im Landkriege*, p. 74.

⁴ See observations of Belgian delegate at Brussels, Brussels B.E. p. 301.

⁵ Report of the Committee, Hague II B.B. (A), p. 132.

⁶ *Kriegsbrauch im Landkriege*, p. 69.

theory nor practice.¹ It was agreed at the Hague in 1907 that a neutral State cannot deprive escaped prisoners of their liberty, but that, on the other hand, it may, by virtue of its territorial sovereignty, forbid them to remain on its soil or attach to their remaining certain conditions as to their place of residence. This provision is no more than a measure of police which might obviously be very necessary if the number of fugitives were considerable. If the refugees object to the place assigned to them, they are at liberty to quit the neutral's dominions.²

The question now settled by the second paragraph of Article XIII is one which was disputed. The French and German Manuals laid down that prisoners of war brought into neutral territory by troops seeking internment should be themselves interned till the end of the war.³ The view which was adopted at Brussels in 1874 was that the prisoners became free the moment they crossed the neutral border: but no express stipulation to this effect was inserted in the text of the project, the matter being regarded as one which "appertained to the law of nations," and which did not require, therefore, to be expressly provided for.⁴ Clearly this view—the view sanctioned by Article XIII—is the more logical and fair one. When troops seek refuge in a neutral country, they do so to avoid defeat: it is the alternative to a tactical disaster. Had no neutral frontier intervened, they would have lost their prisoners (and their warlike material, too). When they are disarmed by the neutral they cannot keep their prisoners, and for the neutral to do so for them—by interning the prisoners—is to annul the effects of the disarming as well as to deprive the pursuing belligerent of a military advantage which the very fact of the conveying troops seeking asylum shows that he would have

The treatment of prisoners of war brought into neutral territory by troops seeking asylum.

¹ Bonfils, *op. cit.* sec. 1462; Pillet, *op. cit.* p. 162. See Hozier, *Franco-Prussian War*, Vol. II, p. 215, and Cassell's *History*, Vol. II, p. 57, as to Bismarck's complaint that Luxemburg allowed a large number of French officers and soldiers who had escaped from Metz to pass through its borders without impediment. Luxemburg was certainly guilty of nothing un-neutral in not interfering with these escaped prisoners, though her action in some other respects was hardly quite unimpeachable.

² Hague II B.B. (A), p. 129.

³ *Manuel à l'Usage, etc.* p. 82; *Kriegsbrauch im Landkriege*, p. 69.

⁴ Brussels B.B. p. 301.

gained had his enemy not broken bounds.¹ The procedure adopted by Switzerland in 1871 was a compromise between the two views I have referred to. She liberated the Prussian prisoners brought into her territory by Bourbaki's (Clinchant's) army, but restored to France an equal number of the interned French troops.²

The treatment of captured war material under similar circumstances.

The case of *matériel* differs from that of prisoners.

The troops who seek asylum may have with them captured *matériel* of war: how should such *matériel* be dealt with? Clearly it is liable to be recovered by the pursuing force if the prisoners are recovered too; and at first sight it would seem as if both captured *personnel* and captured *matériel* should be restored. But there is this distinction to be borne in mind, that prisoners are restored when peace is made, while captured *matériel* is not, and the cornered troops might destroy their *matériel* when brought to bay, but could not destroy their prisoners. The question was raised at the Hague by a Netherlands proposal that at the conclusion of peace the *matériel* should be restored by the neutral to the Government from whose troops it had been captured. Objections were raised to the proposal and it was withdrawn; the nature of the objections are shown in the following extract from the Committee's report:—

On the one hand, the case of war material captured from the enemy cannot be assimilated to the case of prisoners of war. The capture of *matériel* creates for the captor an immediate right of ownership, which places this *matériel* on the same footing as the captor's own *matériel*. On the other hand, even if the captor's right to the property should become uncertain, owing to his taking refuge in the neutral territory, there would be no reason for making the neutral state the judge of the question and for imposing on it the invidious duty of searching the *matériel* brought into its territory by a belligerent force for what has been taken from the enemy and what belongs to the force under some other title.³

The grant of neutral passage to a belligerent's evacuations.

Article XIV makes it competent for a neutral Government, at its discretion, to allow passage to a belligerent's evacuations, without thereby departing from its duties as a neutral. Switzerland granted passages to the German convoys of sick and wounded in 1870; Belgium refused them passage. After

¹ See Pillet, *op. cit.* p. 163.

² Bluntschli, *op. cit.* sec. 785.

³ Hague II B.B. (A), pp. 130-1.

the Sedan disaster, the Belgian Government was approached by Germany with a view to obtaining leave to transport across that country the enormous numbers of wounded, mostly French, whose speedy removal to Germany was desirable for both strategical and humanitarian reasons. Belgium consulted Great Britain before rejecting the application. To have acceded to it would have set the southern line of railways free for the transport of troops, munitions, and war supplies, and would thus have amounted to rendering an indirect assistance to the German operations.¹

Under the second paragraph of Article XIV wounded and sick prisoners forming part of an evacuation to which a neutral State has granted passage must be detained and interned by the neutral, and so must wounded and sick (not necessarily prisoners) who are left in the neutral territory—*e.g.*, invalids who cannot be carried further for medical reasons—instead of being carried through. A different treatment is thus prescribed for wounded and sick prisoners who are brought into a neutral State by a force seeking asylum and those brought into it by a convoy of evacuation. The former must be left at liberty, the latter must be interned. The reason for the distinction is that, in the case of a convoy, the grant of passage is not made out of charity, as it were—to save the force demanding it from a pursuing column which would otherwise have liberated the prisoners—but results from a bilateral agreement to which the parties—the belligerent and neutral State—may attach such conditions as they choose. The agreement which Article XIV recommends embodies a double departure from the ordinary war law of neutrality; the belligerent is granted passage for his convoy—a departure from the rule that belligerent troops must not enter neutral territory except to ask to be disarmed; and the prisoners in the convoy are interned—a departure from the rule that prisoners brought into neutral territory are free. The question of prisoners brought by a convoy was discussed at some length at the Brussels Conference. The Belgian delegate pressed strongly for a decision that the prisoners should either be released by the neutral or that, if passage were granted to

The treatment of sick and wounded prisoners in convoys which are granted passage; and of sick and wounded left in a neutral territory.

Interest-
ing dis-
cussion at
Brussels.

¹ Bluntchli, *op. cit.* see. 778; *Kriegsbrauch im Landkriege*, p. 73; Hall, *International Law*, p. 703.

them, it should be granted only on the condition that the captor should liberate them on recovery from their wounds. He admitted that Belgium interned wounded men in 1870; but that case was quite different, for then people from Belgium had gone to seek these wounded on the territory of the belligerent where they were prisoners of war, and the removal to Belgium was allowed on the express condition that they should retain their character as prisoners in the neutral territory. When Baron Jomini objected that humanity would be sacrificed if the Belgian delegate's view prevailed, the latter replied, very properly, that it was not for the neutral to choose between the military interest and the interest of humanity; the choice rested with the belligerent. No decision was reached at Brussels, nor at the Hague in 1899, when the question was discussed again.¹ The solution embodied in Article XIV of the Neutrality Convention is a compromise between the two views advanced at Brussels. The sick and wounded prisoners are neither liberated nor is their transport permitted; they are removed from the convoy and interned by the neutral.

Section III.—Neutral Persons. (These three Articles have not been accepted by Great Britain.)

ARTICLE XVI.

The nationals of a State which is not taking part in the war are considered as neutrals.

ARTICLE XVII.

A neutral cannot avail himself of his neutrality :

- (a) If he commits hostile acts against a belligerent ;
- (b) If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

ARTICLE XVIII.

The following acts shall not be considered as committed

¹ Brussels, B.B. p. 316; Hague I B.B., p. 153.

in favour of one belligerent in the sense of Article XVII, letter (b):

- (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;
- (b) Services rendered in matters of police or civil administration.

Articles XVI to XVIII are the residuum of a series of German The proposals which would have accorded preferential treatment to neutral persons and property. The policy of Germany was opposed by Great Britain, France, Russia, Holland, and Japan, the first of which Powers has not ratified even the three Articles which have survived the process of elimination. The intention of the suppressed Articles has been partially met by the following *vœux* or Resolutions, adopted by the Conference, expressing the desire:—

1. That in case of war the competent authorities, civil and military, shall make it a special duty to assist and protect the maintenance of peaceful relations, and in particular of commercial and industrial relations, between the inhabitants of the belligerent States and neutral States;
2. That the High Contracting Powers shall seek to establish, by agreements between them, uniform contractual provisions determining the relations, in respect of military obligations, of each State with the foreigners established in its territory.

The *vœux* of International Conferences are apt to be invertebrate, futile things, and it is unlikely that these particular “pious aspirations” will have very much practical effect. At all events they will hardly avail to counteract the very definite decision of the Conference to attribute no extraterritorial character to neutrals resident in a belligerent country. The proposal to favour neutrals has been put to the vote and rejected; that is the concrete fact which the Conference’s labours have wrought and left to us. What M. Léon Bourgeois said at the Hague with reference to the proposed exemption of neutral residents from contributions of war—that such contributions are imposed not *ratione personæ* but *ratione loci*—may be said with equal

The German policy of preferential treatment for neutral individuals

The two Hague *Vœux*.

Neutral residents in an invaded country are subject to all the risks and losses of war.

truth of all the other vicissitudes, risks, losses, inconveniences which people have to face when war is in the land. Domiciled neutrals cannot grumble at having to share the lot of the people in whose midst they have elected to settle. They have come there "for better, for worse"; sunshine and storm, war and peace are equally in the day's work. An invader cannot be expected to suspend his necessary acts of seizure or destruction until he has time to inquire into the precise nationality of the inhabitants who will be affected; and even when time allows of such inquiry being made, the admission of a special *status* for a certain class of residents in an invaded country would be found, in other respects, to clash fatally with the claims of military necessity. As between the invader and the neutral domiciled in the invaded country, the relation under conventional war law does not differ in principle from that which exists between the invader and the enemy national. If the neutral takes service in the army of his country of residence, he is entitled and liable to be treated exactly like an enemy soldier. If he is a non-combatant, his position does not differ, by virtue of his foreign nationality, from that of the non-combatant nationals of the country. Like them, he is subject to the unavoidable losses of war. The other belligerent Government may compensate him therefor, but if it does so it is an act of grace and not of right. Great Britain compensated neutral individuals who were forced to leave South Africa for military reasons during the late war; but she did so without admitting any legal liability.¹ Unquestionably a belligerent will not allow his military operations to be interfered with by neutral residents, however willing he may be to compensate them for their war losses subsequently. When the bombardment of San Juan (Porto Rico) by the American fleet and army was expected in August, 1898, the neutral consuls in the city informed the Spanish governor that they proposed to establish a neutral zone outside the city as a refuge for the foreign residents during the bombardment. The proposal was never put into execution, hostilities coming to an end before the United States troops reached San Juan. One would have liked to see what would have happened had the proposal materialised. There is no doubt that the consuls acted

Proposal
to estab-
lish a
neutral-
ised zone
at San
Juan in
1898 for
foreign
residents.

¹ De-pagnet, *op. cit.* p. 376.

quite in excess of their powers in proposing to neutralise any part of the theatre of hostilities. As Professor Le Fur remarks, the representatives of neutral States are quite at liberty to take steps to safeguard their nationals (as, *e.g.*, by removing them to shipboard), but only on condition that the military operations of neither belligerent are impeded thereby. They certainly have no power to establish a neutral zone in the actual or possible scene of hostilities without obtaining the consent of *both* belligerents.¹ Professor Le Fur's opinion thereon.

One class of neutral residents may alone be said to be entitled to special consideration from the invading belligerent. This is the class of diplomatic agents, who, as representing the neutral sovereigns and governments who have accredited them, must be treated with all courtesy and allowed such liberty of action as it is possible to allow with due regard to the necessities of war. "Neutral States have the right," says the German Manual, "to continue their diplomatic relations with belligerents undisturbed, provided military considerations do not raise temporary obstacles to their doing so."² The question of the position of foreign diplomatic agents in a besieged city was raised at the siege of Paris in 1870. The minister of the United States was refused permission to send a messenger with a bag of despatches to London, except on condition that the despatches should be left open. The Washington Government protested in vain that the German action was a blow at the right of legation; and the agents of the other neutral States likewise objected to their official correspondence being subjected to censorship. The position of neutral diplomatic agents. The case of the neutral diplomats in Paris during the siege.

Bismarck replied that the fact of certain members of the diplomatic body having elected to share the rigours of the siege could not be allowed to redound to the possible detriment of Prussia's military interests, and he pointed out that, in spite of all precautions and the sincerest intentions to avoid it, information of military importance might be passed out of the

¹ *R.D.I.* September-October, 1898, pp. 751-2. M. Politis is certainly wrong when he describes as "perfectly legitimate" the action of the neutral consuls at Volo in 1897, when they landed marines from the neutral war vessels to protect the foreign residents and maintain order upon the approach of the Turkish army. (*R.D.I.* September-October, 1897, p. 725.)

² *Kriegsbrauch im Landkriege*, p. 75.

city if sealed despatches, carried by messengers, were granted passage through the German lines.¹ Before this, Bismarck had informed M. Jules Favre that a beleaguered fortress was no place for diplomatists and that only open letters, having nothing objectionable in them, could be allowed through;² and from this position he steadfastly declined to recede. Hall, while holding that the Germans failed in international courtesy, admits that military necessity justified their taking up the attitude they did, since International Law assigns no predominance to the right of legation over the right of belligerency; and that belligerents cannot be denied "the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided his inviolability remains intact."³

Communi-
cation
allowed
by Japan
between
Pekin
and the
Chinese
governors
in or
beyond
the
theatre of
hostili-
ties.

The peculiar situation of the theatre of operations in the Russo-Japanese war brought up an interesting set of questions of somewhat the same kind. These questions had reference to the effect of the Japanese occupation upon the freedom of communication between Pekin and the representatives of the Chinese Government in outlying provinces situated within or beyond the sphere of the occupation. The rules adopted by the Japanese authorities are this given by Professor Ariga⁴ :—

1. Communications despatched from the Government at Pekin to the local Chinese functionaries in the territory occupied by the enemy, across the region occupied by the Japanese.—Not permitted.

2. Communications addressed by the local Chinese functionaries in the country occupied by the enemy to the Pekin Government across the region occupied by the Japanese.—Permitted.

3. Communications addressed by the local Chinese functionaries in the territory occupied by the Japanese to those in the territory occupied by the Russians.—Not permitted, except in

¹ Quoted, Cassell's *History*, Vol. I, p. 174; see Hozier, *Franco-Prussian War*, Vol. II, p. 133.

² Busch, *Bismarck*, Vol. I, 185.

³ Hall, *International Law*, p. 310.

⁴ Ariga, *op. cit.* pp. 544-7.

exceptional cases after a very careful examination of the despatches.¹

4. Communications addressed by the local Chinese functionaries in the territory occupied by the enemy to those in the regions occupied by the Japanese.—Only allowed after an examination of the messengers and official letters at the outposts.

5. Communications between the Government at Peking and the local functionaries in the territory occupied by the Japanese.—Absolutely free.

“Simple commentaries published by Journals, although unfavourable to one of the belligerent parties, could not, by reason of this fact alone, be considered as a hostile act in the sense of Article XVII (a).” This was admitted by the Hague Committee, in reply to a query on the point raised by the Haiti representative.² But an occupant’s general war right to control the press (*v. supra*, pp. 305, 337), to subject it to censorship, and to suppress it if necessary, would apply to journals conducted by resident neutrals no less than by enemy nationals.

Are unfavourable press comments “hostile acts”?

Article XVIII (a) is illustrated by the Hague Committee’s Report in the following way³ :—

The bearing of Article XVIII (a).

Thus, in case of a war between State A and State B, if a neutral residing in A, or the territory occupied by that State, were to furnish supplies to B or subscribe to a loan issued by that State, he would by so doing commit an act in favour of B, falling under the application of Article 17 (b), and he would lose, in A’s eyes, his quality of a neutral as a result of the sale or loan. It would be the same if the neutral, without being resident in A or in the territory occupied by that State, were to deliver to B supplies coming from A or from the territory that State occupies.

Section IV.—Railway Material.

ARTICLE XIX.

Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or

¹ I think this must be what Professor Ariga means by saying : *Elle fut absolument interdite, ou du moins ne fut permise qu’après un examen minutieux de la part de notre armée* (*op. cit.*, p. 546).

² Hague II B.B. (A), p. 135.

³ *Ibid.*

of Companies or private persons, and recognisable as such, shall not be requisitioned or utilised by a belligerent except when and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilise to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

The right
of Angary.

The property of neutral individuals which is permanently situated in an invaded territory is subject to all the risks of war. The belligerent has an unquestioned war right to seize, use, or destroy such property if military necessity demands. His further right to seize or destroy neutral property which is only passingly within his territory or that occupied by him has now received international recognition, so far as railway material is concerned, in Article XIX of the Convention. Such a right—called by jurists the right of Angary or Prestation—has always been admitted by usage. “The right appears,” says Cobbett, “to be no more than a particular application of the general right which a State has to appropriate all property, foreign or domestic, found within the limits of its jurisdiction or occupation, for purposes dictated by public necessity. To attempt to deny or suppress the exercise of the right in such cases would be futile. One can only say that so far as neutral property is concerned, its exercise ought to be founded on great military necessity and that a proper indemnity ought to be paid.”¹ Two instances of the application of the *droit d'angarie* occurred in the Franco-German War. The Germans seized 600 or 700 carriages belonging to the Swiss Central Railway and kept them for a considerable time.² The other case was an even more remarkable one. Seven English colliers had come up the Seine to Rouen under a German permit and, having discharged their cargoes, were taking in ballast preparatory to returning, when they were severally boarded by parties of German officers and men, who informed the captain in each case that his ship

Two
instances
in 1870 1.
The
seizure of
Swiss
rolling
stock.
The
sinking of
English
colliers in
the Seine.

¹ Sir W. Pitt Cobbett, *Leading Cases and Opinions on International Law*, p. 349.

² Cobbett, *l.c.* ; Hall, *International Law*, p. 744.

was required by the German military authorities. The captains protested and pointed to the flag of England at their mast-heads; but the officers, sure of their war law, were not at all impressed by that symbol, and merely repeated that they had instructions to requisition the ships and sink them in the river: the object being to close the channel against the French gun-boats which made excursions up the river from Havre and Quillebeuf. Some of the ships are stated to have been scuttled before the crew had had time to remove their effects; indeed in one case the German soldiers went down into the hold with augers to scuttle the ship before anything had been said to the master. In no case did the captain haul down his flag: this was done by the Germans in some cases, while in others the ships were sunk with their colours flying. The flag of the *Sylph* is said to have been trampled upon and used as a boot-wiper by the party which boarded that ship. The crews reached Newhaven in a state of destitution and the tale they told—perhaps a little garnished, as mariners' tales are wont to be—very nearly set England in a blaze. The sensation caused by the incident was hardly less acute and deep than that which followed the sinking of the English fishing-smacks on the Dogger by Rojestvensky's fleet in 1904. The matter was taken up by the British Government, who called upon Germany for an explanation. Bismarck at once expressed the regret of his Government, admitted the claim of the owners and crews to indemnification, and promised that if it were proved "that excesses had been committed which were not justified by the necessity of defence," the guilty persons would be called to account. But at the same time he contended

That the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. A pressing danger was at hand, and every other means of averting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible, under reservation of indemnification.

Great Britain did not demur to this statement of the International Law bearing upon the case and the incident was closed by an amicable settlement.¹ Even in the immediate

¹ See a very full account of the incident in Cassell's *History*, Vol. II, pp. 88, 567-8; see also Hall, *International Law*, pp. 744-5; Boyd's Wheaton's

heat of the controversy all the enlightened opinion of England recognised that the Germans had not overstepped their war rights in doing what they did. It was only the extreme pro-Gallicists who cried out for "an hour of Chatham, Nelson, or Cromwell" and demanded a holocaust of Prussian ships to avenge the insult to the British flag. Given a vital and pressing necessity, an emergency "which would compel an individual to seize his neighbour's horse or weapon to defend his own life,"¹ a commander is fully entitled to resort to any seizure or destruction of any property whatsoever which is essential to his self-preservation. The verdict of the German Manual on the Duclair incident—it was at Duclair that the colliers were actually sunk—is a temperate and sound one. The act, it says,

Was certainly justified by the necessities of war, but it amounted to a violent outrage upon English property and for this the British Government claimed an indemnity, which was willingly granted by Germany.²

But the right to seize or destroy neutral property which is not, as it were, *domiciled* in the enemy's country, but which has been brought there in the course of that international commerce which it is the general interest of nations to protect in war as in peace, is a right which requires to be jealously watched and restricted.

The right of a neutral State to retain and utilise belligerent railway stock.

The new provision (added in 1907) of Article XIX which allows a neutral State to keep and use the railway material of a belligerent who has seized its stock has a double object: first, to prevent a neutral State having its own railway service disorganised by the loss of its rolling stock; secondly to provide an automatic discouragement, as it were, to the practice of

International Law, p. 353. The indemnity paid by Germany included (1) the value of the ships and 25% in addition; (2) the highest value of the cargoes at the time of capture and at the place of shipment, less port dues and charges for unloading, which had not been paid; (3) small sums incurred for protests and counter certificates; (4) 5% interest on the sums so ascertained. The masters and seamen also put forward a claim for loss of employment and effects, but the British Government refused to prefer a claim on Germany under this head. The cost of sending the men home was also allowed by Germany (Cobbett, *op. cit.* p. 348).

¹ Sir R. Phillimore, quoted Lawrence, *International Law*, p. 516.

² *Kriegsbrauch im Landkriege*, p. 75.

seizing neutral material which a belligerent might be inclined to resort to if the material so obtained became a clear addition to his resources. The set-off provided by the article constitutes a valuable restraint upon unscrupulous belligerents. The seizure by the neutral is not a measure of reprisals: and it must be resorted to impartially and not in such a way as to favour a particular belligerent.

The remaining Articles of the Convention—Articles XX to XXV, constituting section V—deal with the ratification of the Convention, the commencement of its effect, the adhesion to it of signatory Powers, and its denunciation.

Remain-
ing
articles of
the Con-
vention.

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